CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1863

IN THE MATTER OF J. C. BRYAN.

HABEAS CORPUS.

1. The courts and judges of the States have concurrent jurisdiction with the courts and judges of the Confederate States in the issuing of writs of *habeas corpus* and in the inquiring into the causes of detention, even where such detention is by an officer or agent of the Confederate States.

2. The courts of this State, as well as the individual judges, have jurisdiction to issue writs of *habeas corpus* and to have the return made to them in term-time, and, as a court, to consider and determine of the causes of detention.

3. A person liable to military service, as a conscript, under the act of Congress of April, 1862, and who, by virtue of section 9 of the act, regularly procured a discharge by furnishing a proper substitute, cannot again be enrolled as a conscript under the act of September, 1862.

BRYAN, the applicant, petitioned to the Supreme Court, at the (2) present term, for a writ of *habeas corpus,* alleging that, being between the ages of 18 and 35 years, he procured a substitute, who was duly received by Peter Mallett, then major in command of the conscript camp near Raleigh, and the chief enrolling officer of the State, and that the said Major Peter Mallett, on 29 July, 1862, gave him a discharge for the war; that the age of the said substitute was 39 years; that on 16 June, 1863, he was arrested as a conscript, and was at the date of his

*Judge MANLY was absent during the greater part of the term on account of sickness, and did not participate in the consideration of any of the cases of *habeas corpus* decided at this term.

petition in the custody of Lieut. J. D. H. Young, of Franklin County, as a conscript, under the second law for raising conscripts (September, 1862), and that the said Lieutenant Young is about to carry him to Camp Holmes, a rendezvous for conscripts near the city of Raleigh. The prayer of the petition is for a writ of *habeas corpus* to inquire into the cause of detention of the said J. C. Bryan, and for a discharge. The court ordered the writ, which was accordingly issued by the clerk, and was returned with this endorsement:

I accept the service of this writ, and return for answer, that the facts set forth in the petition are substantially true, and that I arrested him by an order of the enrolling officer for Fifth Congressional District.

J. D. H. YOUNG,
Lieut. 40th Regt. N. C. Militia.

On the return of the writ a day was given in court for the hearing of the case, and as a preliminary to the consideration of the facts stated in the petition, the Court requested arguments from gentlemen present on the question whether this Court and the other courts of superior jurisdiction, and the judges individually of this State, have jurisdiction to issue writs of *habeas corpus* and to consider the causes of detention where the imprisonment or detention was under the authority of the Confederate Government.

B. F. Moore and P. H. Winston, Sr., in support of the juris-
(18) *diction.*

George V. Strong, District Attorney of the Confederate States, with whom was Thomas Bragg, contra.

PEARSON, C. J. Governor Vance having informed the judges that the Secretary of War puts his objection to the release of citizens who have been arrested as conscripts by the officers of the Confederate States after they had been discharged by the State tribunals on writs of *habeas corpus,* upon the ground that the courts of the State had no jurisdiction over the subject, the Court directed the question to be argued as preliminary to the disposition of the many applications before it by writs of *habeas corpus,* and assigned a day. As the organ of the Court, I addressed a communication to his Excellency the President of the Confederate States, informing him of the fact, and that the Court would be pleased to hear an argument by the Attorney-General of the Confederate States or any other gentleman of the bar he might appoint for the purpose. The question has been fully argued by Mr. Moore and Mr. Winston in support of the jurisdiction, and by Mr. Strong, District Attorney of the Confederate States, with whom was associated Mr.
(19) Bragg, against the jurisdiction.

We have devoted to the subject that temperate and mature deliberation which its great importance called for, and the Court is of opinion that it has jurisdiction and is bound to exercise it, and to discharge the citizen whenever it appears that he is unlawfully restrained of his liberty by an officer of the Confederate States. If the restraint is lawful, the Court dismisses the application and remands the party. If, on the other hand, the restraint is unlawful, the Court discharges him. The lawfulness or unlawfulness of the restraint necessarily involves the construction of the act of Congress under which the officer justifies the arrest, and the naked question is, By whom is the act of Congress to be construed? By the Secretary of War and the subordinate officers he appoints in order to carry the conscription acts into effect, or by the judiciary? Or, if the latter, have the State courts jurisdiction over the subject? This, as was well remarked by Mr. Strong, is a dry question of constitutional law, and its decision should not be influenced by collateral disturbing causes.

The jurisdiction of the State courts over the subject is settled in this State, and has been so considered as far back as the traditions of the bar carry us. In 1815 *Judge Taylor,* 2 Law Rep., 57, published *Lewis's case,* decided by the Supreme Court of Massachusetts, in which the Court, upon a *habeas corpus* to an officer of the United States, took jurisdiction and discharged a soldier on the ground that the enlistment was not valid by the proper construction of the act of Congress. That decision was concurred in by the bench and bar in this State, and the jurisdiction has ever since been exercised by our courts and judges, and treated as "settled" until the present term of the Court. In *Ex parte Mason,* 5 N. C., 336 (1809), the jurisdiction was exercised, and a soldier of the United States was discharged by the Court. We have traditions of other cases tried by single judges, but no reports were made of them. About 1847, while on the Superior Court bench, I exercised the jurisdiction, and a soldier was brought before me at Smithville, on a writ (20) directed to the officer in command at Fort Caswell (Captain Childs, who afterwards so highly distinguished himself in Mexico), *In re Mills,* who claimed exemption as a shoemaker during the past winter. In my letter to *Judge Battle* and *Judge Manly,* asking their opinion as to the construction of the conscription and exemption acts, all three of us took it for granted that the question of jurisdiction was settled, and in the opinion filed by me in that and all of the other cases which have been before me, I set forth that the power of the State judges to put a construction upon the acts of Congress, so far as they involve the rights of the citizen (as distinguished from mere military regulations), is set-

tled, and all of the other judges in this State who have issued writs of *habeas corpus* have so treated it (Judges Battle, French, Heath, and Shipp).

The question has been considered as settled in the other States, and their courts have in many cases assumed and exercised the jurisdiction, and it has been conceded by the courts of the United States. Chancellor Kent, 1 Com., 440, referring to *Stacey's case,* says: "The question was therefore settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other States." In the note many cases are referred to. Hurd, in his treatise on *Habeas Corpus,* under title "Concurrent Jurisdiction," refers to and collates a great many cases which fully support his conclusion: "It may be considered settled that State courts may grant the writ in all cases of illegal confinement under the authority of the United States." So if any question can be settled by authority, the concurrent jurisdiction of the State courts must be treated as settled. It must be presumed that this long series of cases which establish the concurrent jurisdiction of the State courts, and their power to put a construction on acts of Congress when necessary to the decision of a case before them, is supported by the most clear and satisfactory reasoning, and it would be idle to attempt to add anything to what has been said by the many able judges who
(21) have discussed the question. I will content myself by making a few extracts from some of the opinions. *Tilghman, C. J.,* in *Lockington's case,* Brightly, 269, (in 1818) says: "It is to be observed that the authority of the State judges in cases of *habeas corpus* emanates from the several States, and not from the United States. In order to destroy their jurisiction, therefore, it is necessary to show, not that the United States have given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the States have vested in their own judges." *Southard, J.,* in *S. v. Brearly,* 2 South., 555, (1819) says: "It will require in me a great struggle, both of feeling and judgment, before I shall be prepared to deny the jurisdiction of the State, and say that she has surrendered her independence on questions like this, and that her highest judicial tribunal, for such purposes, is incapable of inquiring into the imprisonment of her citizens, no matter how gross or illegal it may be, provided it be by the agents of the United States and under color of their laws." "Have we lost the jurisdiction because we cannot construe and determine the extent and operation of acts of Congress? We are often compelled to construe them; they are our supreme law, when made in conformity with the Constitution. Is it because the United States is a party? How does she become a party on such a question? Is she a party for the purpose of despotism? Whenever a man holds a commission from her shall he,

without legal authority, or in violation of her own statutes, injure, imprison, or oppress the citizen? Surely not." In *Slocumb v. Mayberry,* 2 Wheat., 1, (1817), Slocumb was surveyor for the port of Newport in Rhode Island, and under the directions of the collector had seized the "Venus," lying in that port with a cargo, ostensibly bound to some other port in the United States. Mayberry, who was the owner of the cargo, brought an action of replevin in the State court for restoration of the cargo. Slocumb put his defense on the ground that he was an officer of the United States, and the seizure of the vessel and cargo was authorized by an act of Congress, and denied the jurisdiction of (22) the State court. The court took jurisdiction, and decided in favor of Mayberry, on the ground that the act of Congress, by its proper construction, only authorized the seizure and detention of the *vessel,* and did not embrace the cargo; consequently the officer had detained the cargo against law. Slocumb carried the case to the Supreme Court of the United States, where it was held that the State court had jurisdiction, and had put a proper construction on the act of Congress. *Marshall, C. J.,* says: "Had this action been brought for the vessel, instead of the cargo, the case would have been essentially different; the detention would have been by virtue of an act of Congress, and the jurisdiction of a State court could not have been sustained; but the action being brought for the cargo, *to detain which the law gave no authority,* it was triable in the State court." I cite this case, particularly, because in the action of replevin the thing is taken out of the possession of the officer, as the person is taken out of the possession of the officer under a writ of *habeas corpus;* so it is directly in point to show that a State court has jurisdiction wherever the law gives no authority to detain the person or the thing; and, in order to decide that question, the State court has power to put a construction on the act of Congress under which the officer justifies the imprisonment or detention.

To oppose this array of authorities and reason, Mr. Strong relies on two cases: *Ableman v. Booth,* 21 How., 506, and *Hill's case,* recently decided by the Supreme Court of Alabama. With the decision in *Ableman v. Booth,* 21 How., 506, we entirely concur, and agree with *Taney, C. J.,* that it is "a new and *unprecedented attempt, made for the first time,* by a State court" to assume, not merely an exclusive jurisdiction, but a jurisdiction controlling the District Court of the United States. This decision of the Supreme Court of the United States in no wise impugns the concurrent jurisdiction of the State courts, which has been settled by the authorities and reasoning to which we have referred. Two cases were presented. Booth was arrested under (23) a warrant of the commissioner appointed in pursuance to an act of Congress in respect to fugitive slaves, under a charge of having aided

in the rescue of a fugitive slave; and upon examination before the commissioner, probable cause being shown, he was committed to answer a charge of the United States for a misdemeanor, before the District Court in the State of Wisconsin; he gave bail for his appearance, but was afterwards surrendered by his bail and imprisoned by the marshal; whereupon he obtained a writ of *habeas corpus* from a judge of the State and was discharged. After being discharged, the grand jury found a bill of indictment against him in the District Court, upon which he was tried and convicted and sentenced to pay a fine and be imprisoned. While in prison, under sentence, he obtained a writ of *habeas corpus* from the Supreme Court of the State, and was discharged; whereupon the Supreme Court of the United States had the matter brought before it on a writ of error, and decided that as Booth, in the first case, was legally in custody of the marshal on a warrant of commitment to answer a charge for an indictable offense before the District Court, and, in the second case, was in jail under the sentence of the District Court, the State court had no jurisdiction by *habeas corpus* to take him out of the custody of the marshal, or out of jail and discharge him. This was the *decision* in the case, and if the language used by the Chief Justice in delivering the opinion is construed in reference to the facts of the case before the Court, there is nothing either in the decision or the opinion which denies the concurrent jurisdiction of the State courts. It is true the language is susceptible of a wider meaning, and may afford room for an inference that the learned Chief Justice "goes outside of the record," and expresses an opinion against the jurisdiction of the State courts in all cases where one is restrained of his liberty by an officer or *agent* of the Government of the United States, although the imprisonment be unlawful, and is not authorized by the act of Congress under which the officer pro-
(24) fesses to act; but, in our opinion, such an inference will do great injustice to that able jurist; he surely could not have intended to put "his *obiter dictum*" in opposition to the series of authorities above referred to, without making any allusion or reference to them, or any attempt to controvert the reasoning upon which they rest. However this may be, the decision does not conflict with the concurrent jurisdiction of the State courts, and the *obiter dictum*, if it be one, is not entitled to the weight of an authority, and must be treated simply as the opinion of an able lawyer on a question not presented by the facts before the Court, and entitled only to that degree of consideration which its intrinsic merit will command.

The same remarks are applicable to the case of *Hill and others*, recently decided by the Supreme Court of Alabama. The petitioners claimed to be entitled to exemption by reason of bodily incapacity, but had not been held unfit for military service in the field by a surgeon,

under the rule prescribed by the Secretary of War. We fully concur in the decision of the case before the Court; indeed, during the last spring, I refused the application of two persons who claimed exemption on the ground of being "unfit for military service in the field by reason of bodily incapacity," because by the proper construction of the exemption act, only those persons are exempted who shall be held "unfit for military service in the field by reason of bodily incapacity, under rules to be prescribed by the Secretary of War;" and, according to these rules, it was necessary that the party should be examined by a surgeon, or board of surgeons, appointed for that purpose, and the certificate of the surgeon or board of surgeons was the only evidence of bodily incapacity that could be acted on as evidence of the fact; so, in that case, the parties were not unlawfully restrained of their liberty, but were lawfully in custody of the officer of the Confederate States, under the authority of the acts of Congress, according to their proper construction. Consequently, that decision is not opposed to the jurisdiction of the State courts when by the proper construction of the acts of Congress one who is not liable to conscription, or who is exempt, is re- (25) strained of his liberty against law. That portion of the opinion, and reasoning of the learned Chief Justice, which is not applicable to the case, made by the facts before the Court, has received from us due consideration.

On the argument, this position was taken: Congress may authorize the President to suspend the writ of *habeas corpus;* this would not apply to the State tribunals, and if the State courts and judges have power to issue the writ when a person is imprisoned by an officer of the Confederate States, the suspension of the writ, so far as the tribunals of the Confederate States are concerned, would be vain and nugatory. This reply answers the position: The act of Congress would specify the cases in which the writ might be suspended, or would, in general terms, authorize the President to suspend it in all cases where a person shall be imprisoned by order of the President. And as the acts of Congress made in pursuance of the Constitution are the supreme law of the land, it follows that such an act would be as imperative on the State courts and judges as on the tribunals of the Confederate States.

This position was also taken: It is admitted that should a judicial tribunal of the Confederate States, by its construction of an act of Congress, subject a citizen to imprisonment wrongfully, the State courts, having only concurrent jurisdiction, could not interfere to prevent the oppression; and on what ground can they have any more power to prevent oppression on the part of the executive (if we may suppose such a case) than to prevent oppression on the part of the Confederate judiciary? This reply, we think, is a conclusive answer: The judicial tribu-

nals of the Confederate States have jurisdiction, consequently any adjudication of those tribunals would fix the construction of the act of Congress, and the State courts could not review or reverse its decision; whereas the executive branch of the Government has no judicial power, and any construction it might give to an act of Congress would
(26) be the subject of review, either by the State courts or the Confederate courts; and when a citizen is unlawfully deprived of his liberty or property by an executive officer, acting under an erroneous construction of an act of Congress, the State courts may give redress, as in *Slocumb v. Mayberry, supra.*

This further position was taken, and seemed to be mainly relied on: By the conscription and exemption acts, Congress invests the Secretary of War, and the officers he is authorized to appoint in order to carry them into effect, with a *quasi-judicial power,* by which the enrolling officers have jurisdiction to "hear and determine" all questions which are necessary to be decided in order to ascertain whether a person is liable to conscription, or is entitled to exemption, which of course includes the power to put a construction on the acts of Congress. From the decision of the enrolling officer there is an appeal to the commandant of conscripts, and from his decision there is an appeal to the Secretary of War; and possibly there is an appeal to the President. This grant of judicial power is deduced from the several clauses in the acts of Congress by which the Secretary of War is authorized "to make rules and regulations to carry the acts into effect," and from the nature of the subject, because without exercising judicial power it would be impracticable to execute the conscription acts. This position is not tenable. There are three conclusive objections to it:

1. Congress has no power to make the Secretary of War a judge, or to authorize him to invest his subordinate officers with judicial power, for, as I say in the opinion delivered by me *In re Meroney:* "It is true, for the purpose of carrying acts of Congress into effect, the Secretary of War, in the first place, puts a construction on them, but his construction must be subject to the decision of the judiciary; otherwise our form of government is subverted, the constitutional provision by which the legislative, executive, and judicial departments of the Government are separate and distinct is violated, and there is no check or control over the executive." The circumstances growing out of the sub-
(27) ject now under consideration demonstrate the wisdom of the framers of the Constitution in adopting the principle by which Congress has no authority to exercise judicial power or to confer judicial power upon a department of the executive branch of the Government. The military officers appointed to execute the conscription acts

are naturally prompted to increase the numerical force of the army, and for this purpose so to construe the acts as to embrace as many persons as possible. For this reason, and as a protection to those citizens who are not embraced by the conscription acts, the Constitution provides a third branch of the Government in which is confided the trust of expounding the law and putting a construction upon the acts of Congress, and it follows that Congress has no power to ignore the existence of this third branch of the Government and confer on the executive powers which belong to the judiciary.

2. There is no apparent intention of Congress to confer judicial power on the Secretary of War, and authorize him to establish inferior and superior courts, with the right of appeal to himself. If such had really been the intention, it would have been expressed in plain and direct terms, and the simple fact that the Secretary of War is authorized "to prescribe rules and regulations to carry the acts of Congress into effect," which power he would have had almost by necessary implication, surely cannot, when considered calmly and uninfluenced by collateral disturbing causes, be considered sufficient to confer a power on the Secretary of War totally at variance with every principle of our government.

3. If the Secretary of War and his subordinate officers are invested with this judicial power so as to exclude the jurisdiction of the State courts, for the very same reason it would exclude the jurisditcion of the courts and judges of the Confederate States. No provision is made by which a case can be taken for review before the District Court of the Confederate States from these *military judicial tribunals.* Consequently the judicial department of the Government, both State and Confederate, is set aside, and the liberty of the citizen depends solely on the action of the War Department and its subordinate officers. Can (28) this be so? Surely not.

Our conclusion is that the Court has jurisdiction to discharge a citizen by the writ of *habeas corpus* whenever it is made to appear that he is *unlawfully* restrained of his liberty by an officer of the Confederate States; and that when a case is made out, the Court is bound to exercise the jurisdiction, which has been confided to it *"as a sacred trust,"* and has no discretion and no right to be influenced by considerations growing out of the condition of our country, but must act with a single eye to the due administration of the law, according to the proper construction of the acts of Congress.

BATTLE, J. The question presented for the consideration of the Court is whether the courts and judges of this State have the right to issue writs of *habeas corpus* for the purpose of inquiring into the legality of the detention of persons held in custody by officers of the Confederate

States as conscripts, under certain acts of the Confederate Congress. The constitutionality of those acts has never been judicially questioned in this State, so that the only inquiry is that which I have just stated. My opinion is decidedly in favor of the jurisdiction of the State courts, and I will endeavor to state, briefly, the process of reasoning by which I have been conducted to this conclusion. In the exposition of my argument, it will be more convenient for me to show what were the power and authority of the courts of this State in relation to this matter while it was a member of the United States Government; for no one contends that they have less power and authority under the Confederate Government.

After the American Revolution, North Carolina was a sovereign and independent State. In virtue of that sovereignty and independence, she was vested with many and great powers and prerogatives, and had imposed upon her many and important duties. Among these duties none was higher than that of protecting all her citizens in the full and free enjoyment of life, liberty, and private property. Fully alive to this duty, she, in the fundamental organization of her government,
(29) declared "that no freeman ought to be taken, imprisoned, or deprived of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, sec. 12. And again: "That every freeman, restrained of his liberty, is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed." *Ibid.,* sec. 13. To give a practical effect to these rights, courts were established and judges appointed. Had the State been powerful enough to continue to exist as an independent nation, nothing more would have been wanted to secure the protection of her citizens. But North Carolina, for causes not now necessary to be set forth, found it expedient to unite with other States similarly situated, for the purpose of forming a new and distinct government, and in doing so all these States were compelled to give up a portion of their former respective sovereignties, and to invest the newly created government with them. Hence the adoption of the Constitution of the United States, in which, after the enumeration of all the powers conferred on the General Government, it is declared that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See amendments to Constitution, Art. X. This article was indeed unnecessary, as the General Government had no powers except what the States had granted to it, either expressly or by a necessary implication; but it was, out of abundant caution, very propeerly adopted.

We are now to inquire whether the State gave up any portion of that sovereignty which was necessary to be retained for the purpose of enabling her to discharge the duty of protecting the personal liberty of her citizens.

As the courts and judges furnish the means through which that liberty is to be vindicated, let us see what authority or power has been taken from them. Alexander Hamilton, a member of the convention which framed the Constitution of the General Government, and (30) one of its ablest expounders, declared in No. 82 of the Federalist, p. 377: "That the States will retain all *preëxistent* authorities which may not be exclusively delegated to the Federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is in express terms granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as with the latter. And, under this impression, I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes."

Chancellor Kent, 1 Com., 396, in remarking upon the rule as thus stated in the Federalist, says: "A concurrent jurisdiction in the State courts was admitted in all except those enumerated cases; but this doctrine was only applicable to those descriptions of causes of which the State courts had previous cognizance, and it was equally evident in relation to causes which grew out of the Constitution. Congress, in the course of legislation, might commit the decision of causes arising upon their laws to the Federal courts exclusively; but unless the State courts were expressly excluded by the acts of Congress, they would of course take concurrent cognizance of the causes to which these acts might give birth, subject to the exceptions which have been stated."

Among the causes of which the State courts had previous cognizance, none were more important than those in which they claimed the right to inquire, through the means of writs of *habeas corpus,* into the reasons for the imprisonment of persons alleged to be illegally restrained of their liberty. A jurisdiction so essential to the great privilege of going where one may please—a privilege which every citizen of (31) the State would wish to enjoy as freely as he did the air he breathed—the State courts would hardly have parted with except upon the most urgent necessity. As soon, then, as a citizen of the State was supposed to be illegally restrained of his liberty by an officer of the Gen-

eral Government under color of a law of Congress, we might have expected that the State courts would promptly and anxiously inquire whether they had been deprived of their jurisdiction over the matter. They would ask, had it been taken away by an exclusive authority granted in express terms to the courts of the Union?

If, for instance, it were the case of a soldier unlawfully enlisted into the army, the answer would be in the negative. They would then ask, Was it a case where a particular authority was granted to the courts of the Union, and the exercise of a like authority prohibited to the courts of the States? The answer would be still in the negative. They would then ask, Was it a case where an authority was granted to the courts of the Union, with which a similar authority in the courts of the States would be utterly incompatible? That was considered to be a debatable question, and it was debated with great zeal and ability in almost every State of the Union for many years. The result was in favor of the jurisdiction of the State courts, and was thus announced by Chancellor Kent in the first edition of his Commentaries, and was so published in each successive edition of his work until his death. (See 1 Kent's Com., 400-401.)

"In the case of *Ferguson* (9 Johns., 239) an application was made to the Supreme Court of New York for an allowance of a *habeas corpus* to bring up the party alleged to be detained in custody by an officer of the army of the United States, on the ground of being an enlisted soldier; and the allegation was that he was an infant and not duly enlisted. It was much discussed whether the State courts had concurrent jurisdiction by *habeas corpus* over the question of unlawful imprisonment, when that imprisonment was by an officer of the United States, by color or under pretext of authority of the United States. The Supreme
(32) Court did not decide the question, and the motion was denied on other grounds, but subsequently, *In re Stacy* (10 Johns., 328), the same Court exercised jurisdiction in a similar case by allowing and enforcing obedience to the writ of *habeas corpus*. The question was, therefore, settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other States." See, also, Hurd on Habeas Corpus, Book 2, ch. 1, sec. 5, where many cases are stated which show the correctness of Chancellor Kent's assertion.

To the cases mentioned by Hurd may be added that of *Mason*, decided in this State, and reported 5 N. C., 336. The question of the compatibility of the jurisdiction of the State courts with that of the courts of the United States seems thus to have been proved exclusively by long experience of their harmonious action, and the general acquiescence of the country in it.

But it has been recently said that this is all a mistake, and that the decision of the Supreme Court of the United States in *Ableman v. Booth,* 21 How., 506, is directly opposed to the supposition of a concurrent jurisdiction in the courts of the State with those of the Federal Government. With the decision of that case I entirely concur; and I think that it is clearly shown in the opinion of the Chief Justice of this Court, filed in this case, that the remarks of *Taney, C. J.,* in giving the opinion of the Supreme Court of the United States, cannot fairly be construed to sustain the doctrine contended for by the supporters of the exclusive jurisdiction of the Federal courts.

Another case recently decided by the Supreme Court of Alabama has also been invoked to the aid of those who opposed the concurrent jurisdiction of the State courts. The case is that of *Ex parte Hill,* decided at the last January term of the Court, and reported and published in pamphlet form by Mr. Shepherd, the reporter of the Court. An attentive examination of the case will show that though the decision of the Court is right, it cannot be used as an authority for the (33) purpose for which it has been cited. I will premise that the Court is composed of three judges, of whom only the Chief Justice, A. J. Walker, and Stone, judge, were present, the other judge, R. W. Walker, being detained at home by providential causes. The Court agreed in the conclusion that the judge whose action they were reviewing should not issue the writ of *habeas corpus* upon the petition before him. The Chief Justice put his opinion upon the ground of a want of jurisdiction in the courts of the State, but *Judge Stone* expressly said: "I withhold the expression of any opinion on all those cases in which the party, either by name or as one of a class or sect, stands absolutely and unconditionally exempt from conscription, without any other qualification than that he is of the given class: such, for example, as persons under the age of 18 years or over 45, officers judicial and executive of the Confederate and State Governments, etc." The judge then went on with his argument to show that the petitioner in the case before the Court was not exempt from conscription under the law of Congress. In doing so, it seems to me he, himself, as a member of the Court, was assuming a jurisdiction of the case. If he had the right to construe the act of Congress for the purpose of ascertaining that the party was not entitled to exemption, he had the same right to construe the act, if his construction led to the conclusion that the party was exempt. A power to construe the act at all involves, necessarily, a jurisdiction in the Court. If this be so, then the Court was equally divided upon the question of jurisdiction, and, therefore, there was no decision either way upon that question.

Another case reported in the same pamphlet, and, I suppose, decided at the same term, shows manifestly that the Court assumed and exer-

cised jurisdiction over the cause. The case is that of *Ex parte Stringer*. The party being in custody as a conscript, applied for a writ of *habeas corpus* upon the ground that he was a regular member of the "Christian Church," and had conscientious scruples against bearing arms. *Stone, J.,* delivered the opinion of the Court, in which it was decided
(34) that the acts of Congress known as the "Conscription Laws" were constitutional, and that the petitioner did not come within any of the exemption clauses of those laws. The opinion closes thus: "As the opinion of the entire Court is not yet announced, nor indeed formed, on the broad question of the jurisdiction of the State courts in cases like the present, and as we feel no hesitation in refusing the present application on the merits, we place our refusal on the ground stated above. The prayer of the petitioner is denied."

If the Court had no jurisdiction of the cause, I should like to know how it acquired the power to decide the case upon its merits? From this examination, it is manifest, I think, that neither the *Alabama case* nor that of *Ableman v. Booth* has lessened in any sensible degree the weight of authority in favor of the concurrent jurisdiction of the State courts in cases like that now under consideration.

In closing this opinion, I will take occasion to return my thanks to the counsel on both sides for the aid which they have given to the Court by their able and well considered arguments.

Afterwards, the Court invited an argument from the bar upon this question: Whether this Court, as such, had the power to issue a writ of *habeas corpus,* and to determine the case in open court.

B. F. Moore and P. H. Winston, Sr., argued in favor of the jurisdiction.

George V. Strong, District Attorney of the Confederate States, with whom was Thomas Bragg, contra.

PEARSON, C. J. At the beginning of the term the judges requested the members of the bar to investigate the subject and give their opinions and their reasons for them *pro* or *con,* on this question: Has the Court jurisdiction to issue a writ of *habeas corpus,* returnable to the Court, and thereupon to inquire of the lawfulness of any restraint put on the liberty of a citizen? We have been favored with the opinions of Messrs. Moore and Winston in favor of the jurisdiction, and of Mr. Strong against it, and the subject has been fully discussed. After giving it due consideration, we are of opinion that the Court has jurisdiction. This conclusion is put on two grounds:

1. The Court has jurisdiction by common law. The laws of our State rest for a foundation upon the common law of England. It is an admitted principle of the common law that every court of record of superior jurisdiction has power to issue the writ of *habeas corpus,* which is the great right for the protection of the liberties of the citizen. This "power is an incident to every superior court of record." 3 Wilson, 172; 3 Bac. Abr., title *Habeas Corpus;* notes. It arises from the obligation of the king to protect all of his subjects in the enjoyment of their right of personal liberty, and for this purpose to inquire by his courts into the condition of any of his subjects. As this duty of the king in regard to any of his subjects confers on every court of record of superior jurisdiction the power to issue the writ, as incident to its existence, it follows that the duty of the State of North Carolina in regard to its (43) citizens must confer a like power on all of its courts of record of superior jurisdiction, as incident to their existence; for surely, under our Constitution and Bill of Rights, in which is reiterated the great principle of *Magna Carta,* "every free man restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and such remedy ought not to be denied or delayed," the personal liberty of our citizens must be equally as well protected and secured as the personal liberty of the subjects of the King of England.

Our Constitution vests the legislative power in a General Assembly; the executive power in a Governor, and the supreme judicial power in a Supreme Court; so that the establishment of a Supreme Court, without any words to that effect, necessarily and as an incident to its existence, by force of the Bill of Rights, of the Constitution, and the principles of the common law, invests it with power to inquire by means of this great Writ of Right into the lawfulness of any restraint upon the liberty of a free man, and if in establishing a Supreme Court the Legislature had in express terms denied the Court the power to issue this writ and prohibited it from so doing, such prohibition would have been void and of no effect.

Our conclusion that the Supreme Court has power to issue the writ is confirmed by a consideration of the provisions of the *Habeas Corpus* Act, Rev. Code, ch. 55. It is taken from two English statutes, 31 Charles II. and 56 George III. We have seen that all of the Superior Courts of England had power by the common law to issue the writ, but the *courts* could only act in *term-time,* and a free man might be unlawfully imprisoned in vacation time, so the remedy would be delayed; and to provide the means of speedy inquiry into the cause of imprisonment, it is enacted by 31 Charles II. that every judge of all the courts of

superior jurisdiction, on the application of any person imprisoned upon a criminal charge (unless after conviction), shall in the vacation time, under a penalty of £500, grant a writ of *habeas corpus,* returnable
(44) without delay; and by 56 George III. it is enacted that all of the judges shall, in vacation time, under a like penalty, in the same manner grant the writ on the application of any person in prison or restrained of his liberty for any cause other than a criminal charge. So in England any person, whether imprisoned on a criminal charge or restrained of his liberty for any other cause, had a right during the sitting of the courts, by application to the court, and during the vacation by application to any one of the judges, to have the cause of his being imprisoned or restrained of his liberty inquired into without delay.

Our *Habeas Corpus* Act, as before observed, is taken from these two English statutes, and not only gives power to, but requires, under a penalty of $2,500, any judge of the Supreme or Superior Court in the *vacation time* to issue the writ of *habeas corpus* on the application of any person imprisoned on a criminal charge or otherwise restrained of his liberty.

It is manifest that this act presupposes that both the Supreme and the Superior Courts had power in term-time to issue the writ, and the intention was to extend the remedy to the vacation. This must be a declaration by the Legislature of the fact that both the Supreme and the Superior Courts had power to issue the writ, or we must adopt the absurdity that the Legislature intended to give to a single judge in vacation a power which the Court did not possess in term-time, and we can only account for the fact that while giving this power to the judges in vacation, the Legislature did not in express words confer a like power on the courts, upon the ground that it was taken for granted that our courts, like those in England, already had the power; for under the unrestricted legislative power of the General Assembly it not only had the power, but it was its duty by the Constitution and Bill of Rights to confer this power on both the Supreme and Superior Courts, if the courts did not already possess it.

2. Suppose, for the sake of argument, it was necessary that the power should be conferred on the Supreme Court by statute: we are of
(45) opinion that it is conferred by the act establishing the Court. Rev. Code, ch. 33, sec. 6. It is in these words: "The courts shall have power to hear and determine all questions of law brought before it by appeal or otherwise from a superior court of law, and to hear and determine all cases in equity brought before it by appeal or removal from a court of equity, and shall have original and exclusive jurisdiction in repealing letters patent, and shall also have power to issue writs

of *certiorari, scire facias, habeas corpus, mandamus,* and all other writs which may be proper and necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law."

There are several kinds of writs of *habeas corpus:* inferior ones, to enable the Court to exercise its jurisdiction, for instance, *ad testificandum*—to bring a man out of jail to be a witness; and the great Writ of Right, *habeas corpus,* to bring any citizen alleged to be wrongfully imprisoned or restrained of his liberty before the Court, with the cause of his arrest and detention, that the matter may be inquired of and the party set at liberty, if imprisoned against law. This proceeding is original, and in no wise connected with or dependent on any other matter over whch the Court has jurisdiction.

The queston is: Does the act restrict the power of the Court to writs of the inferior sort, or does it confer power to issue the great Writ of Right?

In support of the first construction, it is urged that the words, *"all other writs* which may be proper and necessary for the exercise of its jurisdiction," show that the writs before specified were intended to be of the same kind, and must have the effect of restricting the power of writs of the inferior sort. Several considerations are urged in reply: In strict grammatical construction, the restrictive words, "which may be proper and necessary for the exercise of its jurisdiction," refer to the last antecedent, *"all other writs,"* so as to make the true reading (supplying the ellipsis), "and shall also have power to issue all other writs which may be proper and necessary for the exercise of its jurisdiction." (46) This further reply is made: If the intention was merely to give power to issue the inferior writs necessary to the exercise of its jurisdiction (which power every court in fact has, by implication), it was sufficient to say, "and the Court may issue all such writs as may be necessary for the exercise of its jurisdiction." Instead of this simple clause immediately following the grant of original jurisdiction to repeal letters patent, comes this formal announcement: "and shall *also have power* to issue writs of *certiorari, scire facias, habeas corpus, mandamus."* Why this formal announcement of substantive grant of power? And why are there four writs particularly named, if the object was merely to authorize the Court to issue the inferior sort of writs?

In questions of this kind, the Court is not confined to the narrow field of the import of words, construction of sentences and rules of grammar, but may draw to its aid considerations of a more comprehensive nature, and if due weight is given to the power of the Legislature—its duty, the object in view and the nature of the subject—the conclusion is irresistible that it was the intention to give the Court power to issue the great *"Writ of Right."*

The power of the Legislature in respect to the jurisdiction it was about to confer on the Supreme Court then to be established was unlimited—it had the same power to confer original as appellate jurisdiction.

It was the duty of the Legislature, under the Bill of Rights and the Constitution, to provide in the most ample manner for the protection of the liberty of "all free men." The object in establishing a Supreme Court was to provide the tribunal best calculated to secure uniformity and correctness of decision in respect to all questions involving "rights of persons" and "rights of things." This it was supposed could be accomplished by a court composed of three judges. From the nature of the subject, in actions at law and indictments where the facts must be tried by a jury, it was seen to be impracticable for the Supreme Court
(47) to exercise original jurisdiction. Hence, it was deemed expedient that all actions and indictments should originate in the lower courts, where the facts can be found, so as to present to the Supreme Court only questions of law by way of appeal. In suits in equity where, although the facts are sometimes complicated, the mode of trial is by the court, it was deemed expedient that the proceedings should originate below and then be brought up by appeal or removal after being set for hearing. So, in respect to these remedies, only appellate jurisdiction is conferred.

There remained a fourth distinct and important subject of jurisdiction, to wit, the writ of *habeas corpus*. From its nature no complicated state of facts can be presented, so that consideration presented no objection to the grant of original jurisdiction to the Supreme Court. While, on the other hand, as all of the judges of the Supreme and Superior Courts had power to issue such writs and decide upon the lawfulness of the imprisonment, in order to prevent conflict of decision and utter confusion and chaos, and to give uniformity and correctness to decisions involving the liberty of the citizen, the necessity of conferring original jurisdiction on the Supreme Court to issue the writ and decide on the right was patent; and, if the statute in question does not confer the power, no reason can be assigned for the omission, unless it was the opinion of the Legislature that the power would attach to the Court as soon as it was established, as an incident of its existence, upon the principles of the common law and Bill of Rights.

The Legislature had full power. It was its duty; there was a patent necessity; the object in establishing the Supreme Court could not otherwise be fulfilled, and no objection to it could be suggested. It follows that the Court has the power, either on the ground that the statute confers it or the omission to do so is a legislative declaration that the Court possesses the power as incident to its existence.

On the able argument with which we have been favored by Mr. Strong, he called attention to the fact that the act of Congress, 1789, establishing the Supreme Court of the United States, used nearly the (48) same language as the act of the Legislature establishing the Supreme Court of this State, and that in the construction of the act of Congress the Supreme Court of the United States have decided that the Court cannot issue the writ of *habeas corpus* except where the writ is incident to an appellate jurisdiction.

That is true, and it seems to account for the general impression which has prevailed in this State against the power of the Court. The fact that so many applications have been made to the judges for writs of *habeas corpus* during the last few months has directed attention to this subject; and a closer and more serious investigation than the subject had before received results in the conclusion that the Court had the power, and that the erroneous impression which had prevailed is to be ascribed to the circumstance that due weight had not been given to the difference between the two courts in regard to the *sources* from which jurisdiction may be derived. The Supreme Court of the United States can derive no jurisdiction from the principles of the common law. Its jurisdiction must rest solely on acts of Congress, and the power of Congress to confer jurisdiction rests on the Constitution of the United States. It can have no power except that which is conferred by the Constitution, and by it the power to establish a Supreme Court is restricted to a court of *appellate jurisdiction,* except in cases affecting ambassadors, etc. Art. III, sec. 2.

The very reverse of all this is the case in respect to the Supreme Court of the State. It may derive its jurisdiction from the principles of the common law. The power of the Legislature to confer jurisdiction is unlimited, and there is no reason why it should not, if deemed expedient, have established a Supreme Court with full original jurisdiction, or one with jurisdiction partly original and partly appellate.

In the opinion of *Judge Marshall, Ex parte Bollman,* 4 Cranch., 98, 2 Curtis, 24, a full and critical examination is made of the act of Congress, and he comes to the conclusion that by its true construction it would confer on the Supreme Court jurisdiction to issue the (49) writ of *habeas corpus,* but for the fact that it was to be construed in reference to the limited power of Congress. Our act, on the contrary, is to be construed in reference to the unlimited power of the Legislature, and in this view the opinion of *Judge Marshall* strongly supports the conclusion to which we have arrived.

Mr. Strong also cited *Jones v. McLaurin,* 52 N. C., 392. That was a *scire facias* against bail, and the Court decide that it has not jurisdiction, because the *scire facias* as there used is, in effect, an action of debt, in

respect to which the Court has only appellate jurisdiction. The question we have before us is plainly distinguishable. The *habeas corpus* is totally distinct in its nature from any action at law, or proceeding in the nature of an action or suit in equity, or indictment, and is put by us on grounds peculiar to itself.

Our conclusion is that the Court has power to issue writs of *habeas corpus,* returnable to the Court, and thereupon to inquire of and decide upon the lawfulness of any restraint put on the liberty of a citizen. This opinion does not affect the question of the jurisdiction of a State court where the arrest is justified on the authority or by color of an act of the Congress of the Confederate States. That question may be the subject of future consideration.

Afterwards, the cause was taken up on its merits.

B. F. Moore, with whom was Henry C. Jones, for petitioner.

G. V. Strong, Confederate States District Attorney, with whom was Thomas Bragg, contra.

PEARSON, C. J. For the reasons given by me *In re Irvin* and *In re Meroney,* I am of opinion that the petitioner is entitled to exemption.

In those cases (see note*) I considered the subject fully, although
(60) I was not aided by the argument of counsel. The subject has been fully argued before the Court, and I have reviewed my opinion previously given, with an anxious wish to decide the question

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*Note—IN RE IRVIN.

The facts are: John N. Irvin, being liable as a conscript under the act of April, 1862, offered in July, 1862, one Gephart as his substitute. Gephart was 36 years of age, and in all respects a fit and sufficient substitute for the war, and was accepted by Major Mallett, commander of conscripts, who thereupon gave Irvin an absolute discharge.

The petitioner avers he is advised that the conscription acts are unconstitutional; but it is not necessary for the purpose of this case to decide the question.

It is admitted that, under the regulations of the War Department, Major Mallett had full authority to accept substitutes and give discharges; but it is insisted that Irvin's discharge was afterwards, by the action of Congress, rendered of no effect; for the act of September, 1862, makes all persons between the ages of 35 and 45 liable as conscripts; so Gephart became liable as a conscript, by reason whereof he was no longer a sufficient substitute; and thus Irvin's discharge had no further effect. If one who is at the time liable as a conscript should be offered and accepted as a substitute, it may be conceded the discharge obtained in that way would be void, because no consideration is received by the Government, and the officer exceeds his au-

according to the proper construction of the act of Congress. The (61)
argument and my consultation with *Judge Battle* confirm my judgment as to the correctness of the views taken by me in those cases, and I refer to the opinions filed by me as the ground of my (62)
present conclusion.

BATTLE, J. My opinion concurs with that of the Chief Jus- (63)
tice, that a person liable to military service as a conscript under the act of April, 1862, and who, by virtue of section 9 of that act, regu-

thority. So, if after the conscription act of April one who is under 18 years of age is offered and accepted as a substitute, it may be conceded that the discharge would only be of effect until the substitute arrives at the age of 18; for as it was known to the parties that the substitute himself would become liable at that date under a law then in force, it will be presumed that the contract and discharge were made in reference to that state of things, and after the substitute arrives at the age of 18 the consideration fails, and the officer had no authority to grant a discharge for a longer time.

But in our case there was at the time no law in force under which it was known to the parties that the substitute would afterwards be himself liable as a conscript; on the contrary, he was in all respects fit and sufficient substitute for the war, and was accepted as such, and an absolute discharge given, so there was full consideration received by the Government and full authority on the part of the officer. The question is, Does the subsequent action of Congress, to wit, the act of September, 1862, by its proper construction and legal effect, repudiate and make void the contract and discharge?

The construction of acts of Congress, so far as the rights of citizens, as distinguished from the military regulations, are concerned, is matter for the courts.

Whether Congress has power to pass an act expressly making liable to conscription persons who have heretofore furnished substitutes and received an absolute discharge, is a question not now presented, and one which, I trust, public necessity never will cause to be presented, as it would violate natural justice and shock the moral sense.

In my opinion, the act of September, 1862, by its proper construction, does not embrace men who were before bound, as substitutes, to serve during the war. It is true, the act in general words gives the President power to call into military service all white men, residents, etc., between the ages of 35 and 45; but this manifestly does not include men who are already in military service for the war, for this plain reason: there was no occasion to include them—they were bound before; and the true meaning and intent of the act is to increase the army by calling into service men who were not before liable. Suppose the act contained a provision giving a bounty of $500 to all men called into service under its operation, or providing that such conscripts should not be ordered out of their own respective States, would it be imagined that men who had previously volunteered for the war, or were substitutes for the war, would be entitled to the extra bounty, or to the special privilege of remaining in their own States? Certainly not, because there was no need of legislation in order to make soldiers of them.

A decent respect for our lawmakers forbids the courts from adopting a construction which leads to the conclusion that it was the intention, by the

larly procured a discharge by furnishing a proper substitute, cannot be again enrolled as a conscript under the amendatory act of September, 1862, though such substitute may have been, when received, between the ages of 35 and 45 years.

Cases like the present have been so often and so recently decided in the same way by different judges, and the reasons upon which the decisions were founded have become so generally known through the medium of the newspapers, that it is unnecessary for me to do more than to state briefly my conclusions on the subject.

(64) Persons between the ages of 18 and 35 years, who have furnished substitutes, are certainly not within the meaning of the

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use of general words, to include within the operation of the act substitutes who were already bound for the war not for the purpose of affecting them, but for the indirect purpose of reaching parties who had furnished substitutes, and in that way asserting a power which is at least doubtful, and certainly involves repudiation and a want of good faith.

As the conscription act does not include substitutes, the conclusion that Gephart is no longer sufficient as a substitute, and that Irvin's discharge is of no further effect, fails.

It is considered by me that John N. Irvin be forthwith discharged, with liberty to go wheresoever he will.

It is further considered that the costs of this proceeding, allowed by law, be paid by James Irvin (the officer arresting the petitioner), to be taxed by the clerk of the Superior Court of Rockingham County, according to the statute in such cases made and provided.

The clerk will file the papers in this proceeding among the papers of his office. R. M. PEARSON, Ch. J. S. C.

At Richmond Hill, 9 July, 1863.

*IN RE MERONEY.

The facts of this case bring it within the decision *In re Irvin, ante*, 60. That decision is put on the ground that the conscription act of September, 1862, does not embrace substitutes; and so the questions growing out of the regulations prescribed by the War Department, "where a substitute becomes subject to military service, the exemption of the principal shall expire," was not presented.

It seems to me that any one accustomed to judicial investigation cannot read the act and fail to come to the conclusion that it does not embrace volunteers and substitutes who were already bound to serve for the war. A different construction is excluded by the words used, and is inconsistent and repugnant to its provisions.

The President is authorized "to *call out and place in military service* all white men, etc." The words "*call out*" and "*place in military service*" are not applicable to men who are already in the military service for the war; no legislation was necessary to make soldiers of them. If only a part is called for, provision is made for taking "those who are between the age of 35 and

act of September, 1862, because that act is a call, in express terms, for persons between 35 and 45 years of age. Volunteers and substitutes between the latter ages are not embraced, because, being already in the military service, they cannot, with any sort of propriety of language, be said to be called out and placed in that service, nor can it for a moment be believed that such volunteers and substitutes were intended to be taken from the companies and regiments of which they were already members and sent off to fill up other "companies, battalions, squadrons, and regiments." Not being liable to be called into service under this act, the substitutes cannot be taken away from their principals by force of

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any other age less than 45." Can this be applicable to volunteers and substitutes? It is further provided that "those called out under this act, and the act to which it is an amendment, shall be first and immediately ordered to fill to their maximum number the companies, battalions, etc., from the respective States, etc., the surplus, etc." This supposes that the volunteers and substitutes composing the companies are to remain in the field, and the companies and battalions are to be filled up by those who are ordered into service under the conscript act.

Again, how can the regulation that all conscripts are to be sent to camps of instruction be applicable to volunteers and substitutes? Are they to be taken from the army and sent to camps of instruction? Certainly not, because they are not called out and placed in the military service under the conscription acts, but are bound for the war by the force of the original contracts of enlistment.

I am informed that, soon after the conscription act of April, a regulation was made for the discharge of all volunteers for the war who were over the age of 35; and under it many were discharged; but the regulation was revoked, the War Department becoming satisfied that the act by its true construction did not apply to men who were bound by the terms of enlistment to serve for the war. This is the same construction given by me to the act. Under it all volunteers and substitutes, whether over or under 35 or 45, are to continue in service, because they are not embraced by the conscription acts. I can see no reason why this construction should not be followed to the further consequence, that as substitutes are not embraced by the conscription acts, and do not become subject to military service as conscripts, the fact necessary to the application of the regulations of the War Department does not exist; consequently, the question that may grow out of that regulation is not presented.

It is said the arrest of Meroney was ordered in disregard of the decison *In re Irvin*, because the Secretary of War does not consider the construction given to the conscription act of September "a sound exposition of the act." The inquiry naturally suggests itself, Who made the Secretary of War a judge? He is not made so by the Constitution; Congress has no power to make him a judge, and has, by no act, signified an intention to do so. It is true, for the purpose of carrying acts of Congress into effect, the Secretary of War, in the first place, puts a construction on them, but his construction must be subject to the judiciary; otherwise, our form of government is subverted—the constitutional provision by which the legislative, executive, and

the act, so as to leave the latter liable again under the act of April, 1862, as having no person substituted and serving in their stead. If such principals can be made liable, then it must be on account of some condition, either expressed or implied, contained in the discharges. The only pretense for an express condition is a recital in their discharges that
(65) they are given under the orders and regulations of the War Department. The regulations of that department, made at the time when the discharges were granted, were that the substitute should not be liable to military duty, and should be found, upon an examination by a surgeon or assistant surgeon of the army, to be sound and in all respects fit for military service. See General Order, No. 29. The Secretary of

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judicial departments of the Government are separate and distinct is violated, and there is no check or control over the executive.

According to the view taken by me, it is not necessary, for the purpose of this case, to decide upon the legal effect of the regulations prescribed by the Secretary of War in regard to receiving substitutes; but as those regulations are relied on as authorizing the arrest of the petitioner, it is proper for me to say that many objections entitled to consideration may be urged to the power of the Secretary of War to make the regulations in question. The enactment under which it is assumed that the power to make a regulation that "in all cases where a substitute becomes subject to military service the discharge of the principal shall expire," comes within the scope of the power confided by Congress, in section 8 of the conscription act of April, 1862, in these words: Persons not liable for duty may be received as substitutes for those who are, *under such regulations as may be prescribed by the Secretary of War.*

The obvious construction of this section seems to be: substitutes may be received on two conditions, one implied, to wit, the substitute must be an able-bodied white man, fit for military service in the field; the other expressed, to wit, the substitute must be a person who is not liable to military duty under the existing law; the time, place, and manner of *receiving substitutes*, in which is included the mode of deciding whether he is an able-bodied white man not liable to duty, to be regulated by rules prescribed by the Secretary of War.

If the regulation in question be confined to cases where the substitute, being under the age of 18, afterwards arrives at that age and *becomes* liable to military duty, it accords with the provision of the act. But if it be extended to cases where the substitute is not at the date of the contract of substitution liable to duty, but is afterwards *made liable* by a subsequent act of Congress, it departs from and goes beyond the provisions of the act by adding a third condition, and the power to do so may well be questioned; especially where the regulation as well as the act of Congress which is supposed to give it application are both subsequent to the contract of substitution and the discharge is absolute on its face. For illustration, suppose a regulation to be prescribed that in all cases where the substitute is killed or disabled, or where he deserts, the discharge shall expire, which stand on the same footing with the regulation that the discharge shall expire if the substitute is made liable

War had no power afterwards to make an order to have a retrospective operation to affect rights already attached. The Legislature may pass retrospective laws, but it is very certain that no other department of the Government can. I conclude, then, that the discharges were not subject to any express condition of the kind contended for.

Neither can any such condition be implied. If any can be implied, it can only be upon the ground that the conditional event was in the contemplation of the parties at the time the discharge was given. When the act of April, 1862, gave to conscripts the right to employ, as substitutes, persons not liable under that act to perform military duty, could it have been contemplated by the parties that the substitutes were to be taken away by another act of Congress, to be passed in a few months afterwards? Such a contingency was not so probable as that the substitute might desert, or die of disease, or be killed in battle; and yet no person contends that these contingencies should be regarded as conditions implied in the discharges. The truth is, it was a *casus omissus,* for which Congress neglected to provide, and it is too late for the War Department to attempt to remedy the mischief by assuming to legislate under the name of regulations.

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to duty by a subsequent act of Congress, for all add a third condition to the two imposed by the act, and it may be urged against them that the power to add other conditions than those contained in the enactment is an *act of legislation* which Congress has no right to delegate to a department of the executive branch of the Government, and of course an intention to do so can only be inferred from plain and direct words, and the words, in this instance, are satisfied by the construction stated above.

The same question of construction is presented *In re Huie,* from Cabarrus County, under a clause in the exemption act which exempts all persons who shall be held unfit for military service in the field *under rules to be prescribed by the Secretary of War,* where the power is confined to making rules to ascertain whether the person is or is not fit for military service in the field, and it is decided that the act does not confer power to prescribe a rule under which a citizen may be taken as a conscript, although held unfit for military service in the field, on the ground that he may answer some purpose in the hospitals, etc. These instances tend to show the wisdom of the Constitution in not confiding legislative, judicial, and executive powers to any one department.

I am of opinion that the petitioner is entitled to exemption.

Therefore, it is considered by me that P. P. Meroney be forthwith discharged, with leave to go wherever he will. It is further considered that the costs of this proceeding, allowed by law, to be taxed by the clerk of the Superior Court of Rowan County, according to the act of the General Assembly, be paid by Jesse McLean (the enrolling officer).

The clerk will file the papers in this proceeding among the papers in his office and give copies. R. M. PEARSON, Ch. J. S. C.

At Richmond Hill, 4 July, 1863.

Whether Congress has the power to apply a remedy, and whether it is expedient for it to exercise that power, if it has it, is a question which it is not my province to decide. I have discharged the only duty which devolved on me in this case, when I say I think that the petitioner is entitled to his discharge.

PER CURIAM. Petitioner discharged, with costs against the officer seizing him.

Cited: In re Bradshaw, post, 383; *In re Sowers, post,* 386; *Walton v. Gatlin, post,* 318, 323; *Harkins v. Cathey,* 119 N. C., 663; *McDonald v. Morrow, ib.,* 672.

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IN THE MATTER OF SOLOMON N. GUYER, A BLACKSMITH.

1. Soldiers who had been "placed in the military service of the Confederate States in the field," under the conscription act of April, 1862, and were so at the time of the passage of the exemption of 11 October, 1862, were *held* not to be entitled to exemption under that act.

2. But where a blacksmith, after being so enrolled, was at the time of the passage of the exemption act not so placed in service in the field, but was detailed to work on a Government contract, and did so work at his trade, at accustomed wages, not having received any bounty, pay, rations, or clothing up to that time, it was *held* that he was entitled to exemption.

THE petitioner was a blacksmith, and had worked at the trade for ten years. In May, 1862, he quitted his shop and went to work in the armory of one B. Weathersbie, who was engaged in working for the State of North Carolina. On 8 July he was enrolled as a conscript, and shortly thereafter was detailed at Weathersbie's request to work in his armory, where he remained until the contract was abandoned in the latter part of March, 1863. From the last of March to 19 May the petitioner was in the service of Captain Coffin, in command of the armory, and was working there at his trade of a blacksmith; whence he was directed by Coffin to report to Lieutenant Anderson, enrolling officer for the Sixth Congressional District of North Carolina, which he did as soon as he could find him, to wit, on 22 May, 1863. He then filed his affidavits for exemption, and the proofs necessary to sustain his application, and insisted on his discharge, but this was refused, and he was sent to the camp of instruction near Raleigh, where he was detained, and is still detained, by the order of Col. Peter Mallett, commander of the said camp of instruction. Up to the time of the arrival of petitioner at the camp, he had never received any bounty, pay, rations, or clothing; but since then, he received a few articles of clothing (which are speci-

fied in the proofs) and his daily subsistence. For these causes he applied for a writ of *habeas corpus* to this Court, and on its return, with the cause of his detention, the cause was argued by (67)

Gilmer and Scott for petitioner.
Strong, District Attorney of Confederate States, and Bragg, contra.

PEARSON, C. J. For the reasons given by me in my opinion, *In re Nicholson,* the Court is of opinion that the exemption act of 11 October, 1862, applies as well to the conscription act of April, 1862, as to the conscription act of September, 1862, and the reasoning in *Nicholson's case* is now referred to as the ground of the decision of the Court on that point.*

In regard to the proper construction of the exemption act, in (68) its application to the conscription act of September, 1862, the Court is not called on to express an opinion, as there is no case before it which involves the question.

*Note—IN RE NICHOLSON.

The facts are: Nicholson is 33 years of age, is a miller and millwright, skilled in both trades. He was enrolled as a conscript 8 July, and was ordered into service 15 July, 1862. Between 8 and 15 July he applied to the commandant of conscripts for a special exemption as a miller; this was refused. He, nevertheless, failed to report, and continued at his trade as a miller, as he had habitually done for many years before. In August, 1862, he went into the armory of Lamb & Co. expecting to be detailed, but left before the detail was made and set in to work for one Shipman, as a millwright, where he worked until 1 January, 1863, when he went to Virginia, and set to work as a millwright for one Lamb, where he remained actually employed at his trade until March, when, coming into this State on a visit to his family, he was arrested as a recusant conscript. He has made the affidavit as required by the exemption act.

In the matters of *Mills*, a shoemaker, and *Angel*, a wagonmaker, I decided that the exemption act, 11 October, 1862, applied as well to the conscription act of April as to the conscription act of September. I see no reason to change my opinion. The act adds to the list of exemptions contained in the exemption act of April; uses general words applicable to both conscription acts, "all shoemakers, tanners," etc.; makes no distinction between persons under or over 35, and repeals the former exemption act, showing obviously that the intention was in reference to the conscription act of April, to put the last exemption act in place of the act repealed, and make one exemption act answer for both conscription acts. If this be not so, there are no exemptions between the ages of 18 and 35, and governors of the States, judges, members of the Legislature, etc., under the age of 35, are liable as conscripts; nay, all persons, although "unfit for military service by reason of bodily or mental infirmity," are liable as conscripts, if under the age of 35. Such a construction is inadmissible. It was said by Mr. Scott, on the argument, "This difficulty is met by the power given to the President to make special exemptions." But it could not have been the intention to make governors, judges, and

In regard to the proper construction of the exemption act in its application to the conscription act of April, 1862, the Court is of opinion that no person is embraced by its provisions so as to be entitled to exemption as a shoemaker, tanner, etc., who was at the date of its passage in the army as a soldier; that is, who had, prior to the passage
(69) of the act, been *placed* in the military service of the Confederate States in the field. But that all "shoemakers, tanners," etc., under the age of 35 years who had not been, prior to the passage of the act, "placed in the military service of the Confederate States in the field," are embraced by its provisions, and are entitled to exemption, whether the fact of the party's not having been placed in military service in the field be owing to his not having arrived at the age of 18 years, or to his not being in the State, or to his not having been enrolled, by an
(70) oversight or neglect of duty on the part of the enrolling officer, without default on the part of the party himself (which is one of

members of the Legislature dependent upon the pleasure of the President. The object was to entitle them to exemption *by law*, and *not by favor*.

It was also said, if the act applies to the conscription act of April, it must have a retroactive effect, and its construction will present many difficulties. That is true; but when the clear intention of the lawmakers that the one act should apply to the other appears, it becomes the duty of the judges to adopt such a construction as will make them fit in the best way they can be put together.

In the matters of *Mills* and *Angel* it was not necessary to fix on the time when the act requires the party to be actually employed at his trade, for they were not ordered into service until after its passage, and were, without default, actually employed at their trades, both at the passage of the act and when ordered into service, and, taking either date as "the time," were entitled to exemption.

In this case the point is directly presented. If "the time" be when the party is ordered into service, then Nicholson was entitled to exemption, and his subsequent conduct in keeping out of the way and going to Virginia to avoid an arrest does not prejudice his right, it being induced by the unauthorized act of Government officers in attempting to arrest him, although the more commendable course would have been to insist openly on his right. If, however, "the time" be when the exemption act passed, then he was liable as a conscript, and although actually employed at his trade, cannot claim, for that reason, to stand on higher ground in this respect than if he had been in the army, because of the maxim, "No man shall take advantage of his own wrong."

The clause under consideration does not (except indefinitely, in the proviso) refer to the time when the person claiming to be exempted must be actually employed at his trade. It makes no exception of persons then in service or who had been ordered into service, and puts the stress on the fact of actual employment. It is in these words: "All shoemakers, tanners, etc., skilled and actually employed in the said trades, habitually engaged in working for the public, and whilst so actually employed, provided said persons shall make oath in writing that they are so skilled and actually employed

the cases before us), or, if enrolled, that he was not ordered into service by similar laches of the officer (which is another case before us), or to the fact that when enrolled the party was detailed to work as a shoemaker, or blacksmith, or wagonmaker, in the employment of a Government contractor, the person so detailed receiving no bounty, or pay, or rations, or clothing, as a soldier, but receiving only his (71) accustomed wages as a journeyman tradesman, of which kind is the case now under consideration, and several other cases before us, or whether they had been allowed to remain at home "as a reserve," receiving no pay as soldiers, under the provisions of the sixth section of the conscription act of April. In other words, we draw the dividing line between those who had become *soldiers* and those who had not *left the walks of private life,* and were *actually employed* in their respective trades at the date of the passage of the exemption act.

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at the time, at their regular vocation, in one of the above trades, which affidavit shall be only *prima facie* evidence of the facts therein stated."

In reference to the conscription act of September, it is clear "the time" is when the party is ordered into service; that being the time when the affidavit is called for to enable him to claim exemption. But in reference to the conscription act of April, it is not so easy to fix the time. The difficulty arises from the fact that the exemption act is applicable to both conscription acts, one of which was passed six months before the other, and after it had, in a great measure, been carried into effect. In my opinion, "the time" is the same in reference to the act of April as in reference to the act of September, to wit, when the party is ordered into service. Had the time of the passage of the act been intended, it is reasonable to presume that the words would have been "*now* actually employed," as in the clause just preceding, in respect to physicians, "at *this* time." The policy of exempting shoemakers, etc., being not to favor the individual, but to subserve the public interest, which was greatly prejudiced by taking tradesmen from their occupations, it was immaterial whether the tradesman was under or over the age of 35 years.

The material inqury is, Was he working for the public at the time? which naturally refers to the time when he was called off from his trade—taking the distinction between *volunteers*, who of their own accord had quit their trades, and *conscripts*, who had been taken from their trades by act of law, and should be considered in reference to the intended exemption as still at their trades. This construction is called for by the rule, "the same words in the same statute ought to have the same meaning," and as in reference to the act of September, the meaning certainly is when the party is ordered into service, the same words cannot have a different meaning in reference to the act of April. Had it not been the intention to include all shoemakers, etc., without regard to age, this result would have been avoided by adding the words: "*Provided*, no shoemaker, etc., shall be exempted who is now in service, or has been ordered into service." So the question is narrowed to this, Can the courts add these words to the act? I see no ground on which the omission, if it be one, can be supplied by construction. It was urged by Mr. Scott that the public interest required as many soldiers as could be raised; therefore an intention to exempt any who were already in service, or

The task of making an application of the exemption act to a conscription act, which was passed six months before, and had, in a great measure, been carried into effect (as I say in *Nicholson's case*) is a very difficult one. It is hard to make the one fit the other. The Court has been aided by very full and able arguments at the bar, and after weighing the suggestions offered pro and con, and taking into consideration the act of 9 October, 1862 (two days before the exemption act), which authorizes the President to detail *from the army* persons skilled as shoemakers (not exceeding two thousand), to make shoes for the soldiers, to which our attention was for the first time called by Mr. Bragg, and of which
(72) neither member of the Court was before apprised, we have come to the conclusion stated above.

On the one hand, a construction confining the operation of the exemption act to the few persons who may have arrived at the age of 18 years

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who ought to have been in service, can only be inferred from plain and direct words. This was met by Mr. Gilmer with the suggestion that the public interest required that tradesmen should not be taken from their vocations, and that those who have been taken off by act of law should be allowed to return; as it was seen the public interest had been prejudiced, and it was a matter of difficulty for the people to get a pair of shoes or have a plow sharpened, etc., and that the benefit of a matter of doubt, if there be one, arising from a want of precision in an act of Congress, should be given to the citizens rather than to the Government.

Giving to these suggestions proper consideration, the inquiry, whether the intention was to consult the public interest in the army or at home, can only be answered by the words used. The clause under consideration does "in plain and direct words" exempt all shoemakers, etc., and does not except those who are in the army, or ought to have been in the army, at the passage of the act, and the indefinite words in the proviso, "actually employed at the time," cannot, by any recognized rule of construction, make the exception.

And it does "in plain, direct words" repeal the exemption act of April. This fact has an important bearing on the question of construction, for if it was not the intention that the additional exemptions should apply to persons under 35, why repeal that act? And if such was the intention, the only way in which it can be carried out, and the exemption act be made to fit the conscription act of April (with a few exceptionable cases like *Mills* and *Angel*), is to give it relation to the time when the party was ordered into service and taken from his trade.

Whether shoemakers, etc., who were in service as conscripts when the act passed can *now* claim exemption, or would be taken to have waived the right, by acquiescence, in afterwards receiving pay, etc., is not the question now presented.

Nicholson certainly has done no act that can amount to a waiver of his right; he has not received the State bounty, has received no pay, and has done nothing from which acquiescence can be implied.

It is considered by me that Nicholson is entitled to exemption, and that he be forthwith discharged, with leave to go wherever he will. It is also considered that Lieutenant Anderson (the enrolling officer) pay the costs of

after the passage of the conscription act, and the few exceptionable cases where persons under 35 years of age had by the omissions of the Confederate officers not been enrolled, would certainly be restricting it too much; on the other, to extend its operation to all shoemakers, tanners, etc., who were in the army would seem to carry it too far, and the act referred to (9 October), taking men *out of the army,* by detail, to make shoes for soldiers (restricting the number to two thousand), is inconsistent with the fact that two days thereafter it was the intention to take "all shoemakers, tanners," etc., from the army and send them home to work at their trades. So that broad construction is excluded. The same act furnishes proof that the members of Congress were aware of the fact that the number of artisans working at their respective occupations was not enough to supply the necessities of the public. From this we arrive at the conclusion, without going into a particular examination of the words used, that all soldiers were to continue in service, and all who were at home, *actually employed* at their trades, should remain there, and be exempted as long as they should continue to work at their trades at prices not exceeding 75 per cent. on the cost of production.

This construction varies in some measure from that given by me to the act in the opinion delivered *In re Nicholson;* but the difference does not affect any case now before us; the distinction being that in my opinion, *then,* soldiers were embraced by the exemption act, but those who failed to make their election, and afterwards received pay, rations, clothing, etc., were to be considered as having waived their right to exemption; whereas, in the opinion of the Court, in which I fully concur, soldiers or persons who had been *placed in the military service in the field* were not embraced by the exemption act. Its practical (73) application to the only case of the kind before us (*In re Dixon*) results in the same way. He was under 35; was in the army as a conscript when the exemption act passed; had received the bounty, pay, etc., of a soldier afterwards, up to November, 1862, and was not entitled to exemption: whether on the ground that the exemption act did not embrace his case, or, if it did, that he had waived the right, makes no difference, as in either view he was to be remanded.

PER CURIAM. Let the petitioner be discharged, and recover his costs.

Cited: In re Wyrick, post, 376, 378; *In re Bradshaw, post,* 382; *In re Sowers, post,* 387; *McDonald v. Morrow,* 119 N. C., 672.

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this proceeding, allowed by law, to be taxed by the clerk of the Superior Court of Guilford County, according to the statute in such a case made and provided.

The clerk will file the papers in this proceeding among the papers in his office, and give copies to Nicholson and Lieutenant Anderson.

At Richmond Hill, 4 May, 1863. R. M. PEARSON, Ch. J. S. C.

IN THE MATTER OF BARFIELD GRANTHAM, A SHOEMAKER.

The conscription act requires that the trade on which the claim of a mechanic to exemption is based shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times.

THE facts are stated in the opinion of his Honor.

Everett for petitioner.
Strong and Bragg contra.

BATTLE, J. The petitioner claims to be exempt from military service as a conscript, upon the ground that he was a shoemaker. The testimony offered in support of his claim shows that for some years past he had a small farm on which he worked during the spring and summer, but during fall and winter he made shoes for his own family and for some of his neighbors. In August, 1862, he commenced, and continued to do more work in the business of making shoes than he had been previously accustomed to do, though it does not appear that he devoted himself exclusively to that occupation. This proof is not, in our (74) opinion, sufficient to establish the right to the exemption for which the party contends. The conscription act requires that the trade upon which the claim of a mechanic to exemption is based shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times. A mechanic is excused from military service, not for his own ease and as a favor to himself, but for the benefit of the public, whom, it is supposed, he can serve better by working at his trade than in any other way. He must stand towards the community upon the same footing that a common carrier does, so that all persons who may have occasion to claim the aid of his services may, at all seasonable times, be able to obtain it.

The petitioner has not shown himself to be within the limits of this rule, and his application for a discharge is therefore rejected.

PER CURIAM. Application rejected.

Cited: In re Cunningham, post, 396; *McDonald v. Morrow,* 119 N. C., 672.

IN THE MATTER OF MOORE W. DOLLAHITE, A SCHOOL TEACHER.

A schoolmaster whose occupation had been suspended for twelve or eighteen months, within the term required for his previous pursuit of the business, is not entitled to an exemption under the act of Congress passed on 11 October, 1862.

THIS was a petition for a *habeas corpus* by the plaintiff, who is a citizen of Person County. The facts of the case appear from the opinion of the Court.

Winstead for petitioner.
Strong, District Attorney of Confederate States, and Bragg, contra.

BATTLE, J. The petitioner claims to be exempted from military service in the army of the Confederate States upon the ground of being the teacher of a school. The clause of the exemption act (75) which relates to his case is as follows: "all presidents and teachers of colleges, academies, schools, and theological seminaries who have been regularly engaged as such for two years previous to the passage of this act," which was 11 October, 1862. He states that he had been engaged as a teacher for ten or twelve years before the passage of the conscript act, but that his school had been suspended for twelve or eighteen months in consequence of the troubled condition of the country. He states, further, that at the time of his enrollment he was again engaged in teaching a school.

It seems from the papers which accompany the petition that the case of the petitioner had been referred by the commandant of the camp of instruction to the Bureau of Conscription at Richmond, when the following decision was pronounced: "Exemption declined. The object of the law of 11 October, 1862, in defining certain classes to be exempt from the operation of the conscript acts, was not to attach privileges to those classes, but to abstain from breaking up the existing civil and industrial organizations of the country. Exemptions, therefore, have reference to the *status* at the date of the passage of the act. No antecedent or subsequent coming within the classes enumerated can entitle to an exemption. In the case of school teachers and physicians, the profession must not only have been in existence on 11 October, 1862, but also the pursuit of it, both then and for a specified time previous." We concur in the above decision, and think that the reasoning upon which it is founded fully sustains it. As to the time when the *status* of some of the enumerated classes is to be fixed, we may differ in opinion from the distinguished head of the Bureau of Conscription, but as to school teachers and physicians, the act is express, and leaves no room for doubt.

PER CURIAM. The petitioner must be remanded back to the custody from which he was taken, and must pay the costs of this proceeding.

Cited: McDonald v. Morrow, 119 N. C., 672.

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(76)

IN THE MATTER OF ELIAS RITTER.

1. A person who had been *drafted,* and who had put in a substitute that was accepted by the officer appointed to act on that business, *was held* not liable to be conscripted under the act of September, 1862.

2. The circular of the War Department, dated 20 October, 1861, allowing substitutes to be received after the companies were formed and actually in the service, applies, by a liberal construction, to companies while in the condition of being formed and organized or recruited, and when a substitute is received under the latter circumstances, several of the formalities for obtaining a discharge become immaterial.

PETITION for a *habeas corpus,* before the Supreme Court. Elias Ritter, the petitioner, on the call on the State of North Carolina for troops, was drafted on 25 February, 1862, to go into actual service. He then hired a substitute over 18 years of age, by the name of Medlin, for three years or the war, who was received by Colonel Richardson, an officer authorized by the Government to receive substitutes. Medlin entered into the service for the war, and the petitioner received his discharge from Colonel Richardson. Under the conscription act of April, 1862, Ritter was not called on (being over 35 years), but under that of September, 1862 (being under 45), he was enrolled and ordered into the camp, near Raleigh, and was held there against his will by the officer in command.

It was insisted on the argument that as no company was organized when the substitute was offered and received, that he did not, and could not, comply with the requisitions of the department in furnishing of substitutes.

The regulations of the War Department, alluded to above, are as follows:

"WAR DEPARTMENT,

"RICHMOND, 20 October, 1861.

"1. When any noncommissioned officer or soldier of the volunteer service desires to procure a substitute, he shall first obtain the written consent of the captain of his company and of the commander of his regiment or corps, a duplicate of which he shall forward to the substitute.

"2. The substitute shall then obtain from some surgeon and some commissioned officer in the service of the Confederate States a certificate of his fitness for service and of his having been mustered into the service of the Confederate States for the war, no matter what the (77) term of the service of his principal may be, and these several certificates shall serve as a passport to the holder to join the regiment or corps to which his principal belongs—he paying the expenses of his own transportation.

"3. When a noncommissioned officer or soldier is entitled to discharge, by reason of a substitute, the captain of his company and the commander of his regiment or corps shall give him a certificate to that effect, stating that the substitute furnished according to the regulations is actually on duty with the regiment or corps; that the holder of the certificate is in no wise indebted to the Confederate States, and that he is not entitled to transportation at the expense of the Government; and this certificate shall serve the holder as a passport to leave the camp and travel to his home.

"4. If it shall be found that a noncommissioned officer or soldier, discharged by reason of a substitute, is indebted to the Government, the commander of the regiment or corps giving the discharge will be held accountable for the same, and any back pay due said noncommissioned officer or soldier shall be drawn and receipted for by the substitute at the next pay day.

"5. Commanders of regiments or corps shall, under no circumstances, permit substitutions in their commands to exceed one per month in each company, and all such cases shall be noted in the following morning report of the regiment or corps in which they occur, and in the next muster roll and monthly return."

McDonald for petitioner.
Strong and Bragg contra.

PEARSON, C. J. We are of opinion that the circular from the War Department, dated 20 October, 1861, by which substitutes were allowed to be received after the companies were formed and actually in service, applies, by a liberal construction, to the companies while in the act of being formed or organized, or recruited, without the neces- (78) sity of the details which were made material by the fact that when the party was in service and wished to put in a substitute, many circumstances had to be attended to in order to prevent confusion—as the back pay or indebtedness of the principal and mode of getting home, and then to allow too many at a time might disorganize the company; but when the companies were in the act of being organized, no considerations of

that nature were presented, and the purpose was fully answered by putting in an able-bodied man for the war; and if proof can be made that these essentials were complied with, the object is fully answered when the substitute went into the service, and is still there, or has been killed or disabled.

PER CURIAM. Petitioner discharged.

Cited: In re Prince, post, 195; *In re Wyrick, post,* 377; *McDonald v. Morrow,* 119 N. C., 672.

SYLVIA CAROLINE WALLIS v. LOUISA A. WALLIS.

1. A widow under 21 years of age cannot be appointed an administratrix. But the court may appoint an administrator during her minority, and, on her arriving at full age, grant her the administration. Or, it may give the office to her appointee.

2. On an appeal to the Superior Court from a grant of administration, it is not proper in that court, on the reversal of the order below, itself to make the appointment, but to order a *procedendo* to the county court.

APPEAL from an order of the County Court, appointing an administrator, before *Bailey, J.,* at Fall Term, 1860, of ONSLOW.

The plaintiff, as the widow of James G. Wallis, was appointed by the county court of Onslow administratrix. It appeared that at the time of this appointment she was only about 17 years old. The defendant, who is the mother of the intestate, opposed the motion in the court below, on the ground that the plaintiff was under age, and on the further
(79) ground that she (defendant) was the greatest creditor of the intestate, and appealed from the judgment.

The Superior Court reversed the judgment below. A motion was then made to grant letters to the appointee of the plaintiff, which was allowed by his Honor, and the defendant appealed.

McRae for plaintiff.
Donnell and Humphrey for defendant.

PEARSON, C. J. We concur with his Honor in the opinion that the county court erred in granting letters of administration to Caroline Wallis, the widow of the intestate. As widow, she was entitled to the administration, but the court could not grant it to her until she arrived at the age of 21 years, for the law presumes that before that age she is not capable of discharging the duties of administratrix.

She did not, however, on that account lose her right, and, in order to preserve it, the court might have granted letters of administration to some other person *durante minoritate,* so that when she arrived at full age the general administration could be granted to her. Or the court might have granted the administration to such person as she should appoint. *Ritchie v. McAuslin,* 2 N. C., 220; *Pearce v. Castrix,* 53 N. C., 73.

In the Superior Court his Honor decided correctly that the appointee was entitled to the administration; but he erred in granting the administration, instead of directing a *procedendo* to the county court. This was done in *Pearce v. Castrix, supra,* as we find by a reference to the record, although it is not set out by the reporter, and such has been the practice since the adoption of the Revised Statutes. The county court has a peculiar jurisdiction in the probate of wills and granting letters of administration. It is substituted for the court of ordinary in England. The original will is to be filed there; the returns are to be made there by executors and administrators, and the settlement of estates is (80) to be made there.

We presume his Honor was misled by the case of *Blount v. Moore,* 18 N. C., 10. That case was decided under the act of 1777, Laws of North Carolina, ch. 115, sec. 58, which directs the Superior Court, in cases of appeal, to grant letters of administration. That provision is omitted in the Revised Statutes, and also in the Revised Code. See ch. 46, secs. 1, 2, 3; ch. 4, sec. 2; ch. 31, sec. 17, from which it is evident that the letters of administration are *now* to be granted by the county courts, and, in cases of appeal, after deciding who is entitled to administration, the Superior Court should order a *procedendo.* For the error in this respect, the judgment is

PER CURIAM. Reversed.

Cited: Millsaps v. McLean, post, 83; *Hughes v. Pipkin,* 61 N. C., 6; *Little v. Berry,* 94 N. C., 437; *Garrison v. Cox,* 95 N. C., 355; *Williams v. Neville,* 108 N. C., 561, 566; *Boynton v. Heartt,* 158 N. C., 495.

RICHARD J. MILLSAPS v. ARCHIBALD MCLEAN ET AL.

1. Where one, by will, gave all his slaves, equally to be divided among his four children, and afterwards, by deed of gift, gave two of them by name to one of his children, there is no rule of law preventing the donee of the two from coming in for an equal share of the residue.

2. Where on a petition for the partition of slaves the county court ordered that partition should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed and the division ordered in different proportions, it was *held* that the Superior Court was not in possession of the whole case by the appeal, and that a *procedendo* to the county court was proper.

PETITION for partition of slaves, heard before *Bailey, J.*, at Fall Term, 1862, of ROBESON.

Neill McLean, by his last will, executed in 1846, gave to his wife, Nancy, her dower in his land, and among other bequests of personal property, he bequeathed to her as follows: "Also, all my negro slaves, all my crop of corn, cotton, peas, and potatoes, during her widow-
(81) hood; then, after that, to be equally divided between all my heirs. I also will and bequeath to my two sons, Archibald and Daniel W. McLean, all my lands, to be equally divided between them."

Afterwards, to wit, in 1853, after the marriage of his daughter, Mary Ann, with Richard J. Millsaps, Neill McLean, by a deed of gift duly executed, gave to her two slaves, Calvin and Rose, which were of his estate when the above mentioned will was written; and to her son, Neill Millsaps, a negro child named Harriet. R. J. Millsaps and his wife filed this petition in the county court of Robeson against the above named Archibald and Daniel McLean, and another son, Nathaniel, alleging that she, with her three brothers, are the only children of the testator, and that these petitioners are entitled to certain slaves (naming them) as tenants in common under the will of Neill McLean.

The defendants in their answer to this petition assert that in making the deed of gift Neill McLean intended to give her the enjoyment of the share he designed for her under his will, and they insist that "if the plaintiffs claim these slaves independently of the will, they will not be allowed their share of the other slaves named in the petition." They, therefore, insist that Calvin and Rose shall be brought into the common stock, and the division be made of equal shares in the whole stock.

The county court gave judgment "that the slaves conveyed in the will of Neill McLean should be divided equally between the legatees, notwithstanding the conveyance by deed of gift to his daughter," and commissioners were appointed to make the partition according to this decision. The petitioners prayed an appeal to the Superior Court, and on the hearing of the cause in that court his Honor reversed the decision of the county court and ordered that the partition be made as prayed by the plaintiffs and a *procedendo,* from which the defendants appealed to this Court.

Shepherd and W. McL. Mackay for petitioners.
Leitch for defendants.

PEARSON, C. J. We concur with his Honor. The slaves (82) which the testator had conveyed to his daughter, Mary Ann Millsaps, did not constitute a part of his estate at the time of his death, and do not come within the general description given in the will, and of course are not subject to partition among the legatees in remainder after the death or marriage of the widow .

As the slaves are not embraced in the will, the rule relied on by the defendants, "one cannot claim under and against a will," has no application. If these slaves had been *named* in the will, the point would have been presented. But they are not named, and do not come under the general description; so the defendants have nothing to rest their claim on except what they suppose to be a hardship—that Mrs. Millsaps shall hold two negroes, under the deed of gift, and come in for an equal share of the negroes belonging to the testator at the time of his death. It may be that Mrs. Millsaps thinks it equally hard that the sons of the testator should take all of his land and come in for an equal part of the slaves. Considerations of this nature are not matter for the Court. Its province is to determine the rights of the parties according to the legal effect of the deed of gift and the will, and that question is almost too plain for discussion .

The matter was presented in another point of view, *i. e.,* the gift to Mrs. Millsaps was an ademption of her legacy in respect to the testator's slaves. We can see no ground on which this suggestion can rest. The fact that the testator does not name the slaves in his will, but gives, in general terms, "all my negro slaves to my loving wife during her widowhood, then, after that, to be equally divided between all my heirs," is fatal to the suggestion of an ademption. See *Gillis v. Harris,* 59 N. C., 267.

Shafner v. Fogleman, 44 N. C., 280; *Harvey v. Smith,* 18 N. C., 186; *Morehead v. R. R.,* 52 N. C., 500, which were cited and relied on to show error in that part of the judgment directing a *procedendo* to the county court, do not sustain the position. The general rule is, "when the judgment of the county court is final, so as to put an end to the case so far as that court is concerned, the Superior Court (83) having the case in its possession will dispose of it finally; otherwise, a *procedendo* will be ordered to the county court. There is this exception, *i. e.,* the Superior Court will *always* order a *procedendo* where the county court has a peculiar jurisdiction—as in regard to the probate of wills and granting letters of administration." *Wallis v. Wallis, ante,* 78.

In this case the judgment of the county court is not final, so as to put an end to the case so far as that court is concerned, but it is interlocutory; it decides the question of law raised by the petition and answer,

against the petitioner, and directs a partition in pursuance of that instruction, retaining the case for the coming in of the report of the commissioners for the final action of the court. So, according to the general rule, a *procedendo* ought to have been ordered.

PER CURIAM. No error.

Cited: Mordecai v. Boylan, 59 N. C., 371.

JOHNSON & BOWLES v. ALEXANDER MURCHISON.

1. Where a rule was obtained against a plaintiff in the county court to give oyer of his cause of action by a given day at the next term, it was *held* to be regular for the plaintiff to submit to a nonsuit before the day assigned at the next term, and take an appeal to the Superior Court.

2. A nonsuit may be entered before the defendant's appearance or before pleading, or at any day of continuance in the cause.

3. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for irregularity, it was *held* that all such objections were considered as waived by the delay and acquiescence.

4. It is not ground to dismiss an appeal in the Superior Court, that the county court failed to enforce a rule made by itself, incidentally, in the progress of a cause.

(84) This was a motion before *Bailey, J.,* to dismiss an appeal at Fall Term, 1862, of MOORE.

The facts of the case are fully stated in the opinion of the Court.

Neill McKay and McDonald for plaintiffs.
Buxton, Haughton, and Strange for defendant.

BATTLE, J. This was an action of debt upon a bond, brought to the court of pleas and quarter sessions for the county of Moore. Upon the appearance of the defendant at January Term, 1859, he craved *oyer* of the bond, and the suit was continued in this condition until July Term, 1860, when the defendant obtained a rule upon the plaintiff to give the oyer demanded of him "on or before Thursday of the next term of the court, or this cause will stand dismissed." At the next term the following entry appears upon the record: "Judgment of nonsuit in this case on Wednesday of this term, from which an appeal is prayed and granted to the Superior Court." In that court the cause was put upon the trial docket at Spring Term, 1861, with the entry, "Oyer craved before pleading." In this condition the cause was continued from term to term,

until Fall Term, 1862, when the record shows that oyer was had. At the same term it appears that the following judgment was rendered: "Motion by the defendant's counsel to dismiss the appeal, on the ground that the plaintiff had no right to take a nonsuit after the rule was granted at July Term, 1860, of the county court. Motion sustained, and appeal dismissed by the court." From this judgment an appeal was taken to the Supreme Court.

The Superior Court erred in dismissing the appeal to it from the county court. This error proceeded from a misapprehension of the nature of nonsuit. We suppose this may have been so, because the counsel of the defendant contends here that the plaintiffs had no right to take a nonsuit in the county court before they gave oyer of the bond upon which the suit was brought. Plaintiffs cannot, properly, be said to *take* a nonsuit at all. It is a judgment rendered against them, when they are demandable, for not appearing upon the demand (85) for them. Thus in 5 Com. Dig., 548, it is said that "If the plaintiff does not appear at the day when he is demandable, he shall be said to be nonsuited *quia non est prosequt,* etc. Co. Lit., 138 b. And this may be before the defendant's appearance, or at the return of the writ." *Ibid.* "So at the return of an assize, if the plaintiff is not ready to make plaint on the demand of the tenant, he shall be nonsuited. Salk., 82. Or a plaintiff may be nonsuited after an appearance as at any day of continuance, for the plaintiff is then demandable and is the first agent. Co. Lit., 138 b." These extracts, taken from the highest authority known to the law on the subject of pleading, show that the judgment of nonsuit in the county court was perfectly regular. When the cause was reached on Wednesday of the October term of the county court, the plaintiffs were demandable, and judgment of nonsuit which was then rendered against them necessarily imports that they were demanded by the defendant, and, upon their not appearing, the judgment against them was given. From this judgment they, of course, had a right to appeal, under the provisions of the Revised Code, ch. 4, sec. 1.

But, supposing there had been some irregularity in the judgment of the county court, we should hold that the defendant had, by his delay, waived his right to move to dismiss the appeal from the Superior Court. The latter court certainly had no right to dismiss the appeal because the rule in the county court had not been complied with. Every court must enforce its own rules, made, incidentally, in the progress of a cause; upon an appeal, the higher court cannot notice such rules, which have been made in the inferior tribunal.

PER CURIAM. Reversed.

Cited: Bank v. Stewart, 93 N. C., 403.

(86)

THOMAS BAILEY, TRUSTEE, *v.* JOHN C. MOORE ET AL.

1. Where a parol agreement was made between A. and B. for the exchange of slaves, and A.'s slave immediately went into possession of B., but the latter's slave, being runaway, it was agreed that A. should take him into possession whenever he could do so (at his risk), it was *held* that on A.'s afterwards taking possession of the runaway slave the title to him passed.
2. And it was *further held*, that such a contract made with the attorney of B. under a *parol* authority (followed by delivery) was valid to pass the title.

ACTION of detinue for a slave, tried before *Bailey, J.*, at Spring Term, 1863, of JOHNSTON.

On 8 November, 1854, Henry R. Nelson made to the plaintiff, as trustee, a deed for six slaves, valued at about $4,000, to secure debts amounting to about $400, among which slaves was the man Hinton, now in controversy. In November following the plaintiff, as trustee, put up the slaves to auction, and they were bid off by divers persons. The slave, Hinton, was then runaway, and he was cried off to a bidder, on the condition that if the purchaser did not get him, he was to pay no money. The slave not coming in, this sale was, after a month elapsed, rescinded by the parties. Afterwards, 19 February, 1854, Nelson executed to the defendant Moore the following instrument: "Received of John C. Moore his negro man, Cager, in place of my boy, Hinton, to which I warrant the right and title to be good against the claims of all persons whatsoever, but do not warrant the delivery of the said Hinton, as he is now in the woods or runaway; therefore, the said Moore takes the said Hinton as he runs." Signed and sealed by the said Nelson. Cager went into the possession of Nelson and continued to work for him until his death, in July, 1855. After this trade, Hinton was captured and went into Moore's possession. After the sale of the slaves under the deed of trust, several of them continued in possession of Nelson.

The defendant, among other defenses, contended that the exchange was made by the consent of the plaintiff; that he authorized it
(87) before it was made and assented to it afterwards; that the slave Cager, after the exchange, was under the control of the plaintiff, or of Nelson, as his agent, and the defendant offered evidence of this defense, both by the conduct and declarations of the plaintiff, but produced no writing showing such assent or authority.

The court was of opinion, and charged the jury, that although they should believe the exchange was made by Moore and Nelson in the manner alleged, and by the parol consent and authority of the plaintiff, or of Nelson, as his agent, still the plaintiff was entitled to recover.

Defendant's counsel excepted. Verdict and judgment for plaintiff. Appeal by defendant.

Phillips for plaintiff.
Winston, Sr., and Moore for defendant.

PEARSON, C. J. Assuming the facts to be that Nelson, having a verbal authority from Bailey to exchange Hinton for Cager, made the exchange, received Cager from Moore, and told Moore to take possession of Hinton as his property whenever he could do so; that Hinton was a runaway, but was afterwards apprehended and taken into possession by Moore as his property in pursuance of the agreement, his Honor was of opinion that the plaintiff was entitled to recover. We do not concur.

The statute provides that "All sales of slaves, accompanied with actual delivery of the slave to the purchaser, shall be valid." Rev. Code, ch. 50, sec. 13.

It was insisted by Mr. Phillips that the sale or exchange (which is the same thing) must be accompanied with delivery; that is, that the sale and delivery must be at the same time, and that the delivery must be actual, that is, although it need not be a delivery from hand to hand, still the slave must be present and the possession be changed at the time. For illustration, he referred to the old doctrine of "livery of seizin in deed," where the parties went upon the land and made livery, and livery in law, when the parties did not go on the land. (88)

We think neither branch of this proposition can be maintained, and the counsel has fallen into error by not distinguishing between a "contract of sale" and a sale or contract executed, by which the title passes.

At common law the title to personal property passes by a sale without delivery: For instance, A. sells B. a horse and receives the price or a note for it; the horse, although 10 miles distant, instantly becomes the property of B. This principle of the common law was confined to sales, for delivery was necessary to pass title by a gift, and in the civil law delivery was necessary to pass title either by sale or gift. In respect to slaves (the most valuable species of personal property) it was seen that this rule of the common law opened the door to fraud and perjury. To remedy this evil, the statute provides that all sales of slaves shall be in writing, attested by a credible witness, unless the sale be accompanied with the actual delivery of the slave to the purchaser, so as to give notoriety to the transaction by a change of possession, a fact about which there can be no mistake, and consequently no room for perjury. The object of the statute is to change the common law in respect to the sale of slaves, and to provide that the title shall not pass as soon as "the

bargain is struck," but shall remain in the vendor until there is an actual delivery, which is fully accomplished by treating the bargain or agreement to sell as merely inchoate and of no effect until the sale is consummated by a change of possession; when that is done, there *is a sale*, and not before; so that, literally, the sale is accompanied with an actual delivery. For instance, A. sells B. a slave and receives the price; at common law the title would pass *instanter;* but under the statute it does not pass. If, however, A., on the next day, carries the slave to B. and delivers him, the sale is consummated, and the title passes. So, if after the agreement to sell, A. says to B., "The slave is at my plantation; go and take possession of him as your property," and, accordingly, B., on the next day or the next week, goes and takes the negro into possession and carries him home with him, there is a sale, and the
(89) title passes by the change of possession.

The allusion of the counsel to the doctrine of "livery of seizin" furnishes an apt illustration, and, when followed out, supports the correctness of our conclusion. If the parties *go on the land* and the feoffor makes livery to the feoffee, the title passes *instanter;* but if the parties do not go on the land, the livery of seizin is simply livery in law, and the title does not pass, unless the transfer is afterward consummated by the entry of the feoffee in the lifetime of the parties. So the livery in law is inchoate merely, but still is a foundation for the feoffment to rest on, so that it may be consummated and pass the title by the fact of the feoffee's afterwards taking possession, and thereby giving notoriety to the transaction, so that every one may see that the feoffor has ceased to be the fee-holder, and the feoffee has taken his place.

To the suggestion that livery in law cannot be made by attorney, the reply is, livery in law was only allowed when the feoffor could not go on the land for fear of bodily harm. This is personal to him, so he cannot in such a case act by attorney. This reason has no application to a sale or contract to sell a slave, which, under a general rule of law, may as well be done by attorney as in person. *Facit per alium, facit per se.* There is

PER CURIAM. Error.

DOE ON DEMISE OF WILLIAM A. BLOUNT ET AL. V. SARAH WRIGHT.

A judgment that the defendant recover his costs from the lessor of the plaintiff, in an action of ejectment where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper.

BLOUNT *v.* WRIGHT.

THIS was a motion to set aside a judgment and execution, (90) heard before *Heath, J.,* at Spring Term, 1859, of ROBESON.

An ejectment had been brought against the defendant, in which there was a count on the demise of the plaintiffs. In the suit the defendant prevailed, and a judgment was rendered against the lessors of the plaintiff for costs, on which the execution issued. The plaintiffs' counsel moved to set aside the judgment and execution, but the court refused the motion, and the plaintiff appealed to this Court.

Jenkins Rodman for plaintiffs.
Strange for defendant.

BATTLE, J. The validity of the judgment rendered in the court below against the lessors of the plaintiff for the costs of the suit is impeached upon the ground that they were no parties to the suit. In support of this position, the well-known rule, that upon the death of the plaintiff in an action of ejectment the suit does not abate, is relied upon. See *Thomas v. Kelly,* 35 N. C., 43; *Wilson v. Hall, ibid.,* 489.

The reason why an abatement does not take place in such a case is founded upon the peculiar nature of the action; but from that it does not follow that the lessor is not a party to the suit. He is certainly such, for the purpose of being compelled to give security for the prosecution of the suit, and if there be a nonsuit, he may be compelled to pay the costs. See Revised Code, ch. 31, sec. 45; *Thomas v. Kelly, supra.* It is certain that the lessor is regarded by the courts as so much a party that upon a recovery he is the person to be put into possession of the land recovered, and that the action for the mesne profits may be maintained in his name, as well as in that of his nominal lessee. *Holdfast v. Shepard,* 31 N. C., 222. If, then, the courts permit the lessor of the plaintiff, in ejectment, to take all the benefits of a recovery in the action, we cannot perceive any just reason why, upon a failure, he may not have a judgment rendered against him for the costs. That in such a case he may be ordered to pay costs is directly decided in *Scott v. Sears,* 31 N. C., 87. (91)

But it is insisted for the plaintiffs that the only mode by which the payment of costs can be enforced against the lessor is by attachment, and for this position 2 Arch. Prac., 56, is cited as a conclusive authority. Supposing that such is the English practice, we are not bound to adopt it when the milder one of an execution against the property of the party will answer the same purpose. That the latter mode may always be adopted when an attachment would lie against a party to enforce the payment of costs, we intimated in *Clerk's Office v. Allen,* 52 N. C., 156.

Our conclusion is that the court below did not err in refusing to set aside the judgment and execution which had been rendered at a previous term against the lessors of the plaintiff.

In his argument here the counsel for the lessors have alleged that their names were used without their knowledge or consent. We find no evidence tending to support the allegation, either on the record proper or in the bill of exceptions. But if it were true, it could not affect the rights of the defendants to recover their costs. The only remedy of the lessors would be against the person or persons who had, without authority, used their names in such a manner as to subject them to damage.

PER CURIAM. Judgment affirmed.

THE STATE ON THE RELATION OF DUNCAN McLAURIN v. WILLIAM BUCHANAN ET AL.

The provision of section 3, chapter 78, Revised Code, giving the whole amount of debt as damages for the failure of an officer to collect a claim put into his hands for collection, when the debtor is solvent, only applies to claims within the jurisdiction of a justice of the peace, and does not apply in cases of noncollection of process issuing from court.

(92) DEBT on sheriff's official bond, tried before *Bailey, J.*, at Fall Term, 1862, of RICHMOND.

The relator gave in evidence a writ of *fieri facias* issued from the Superior Court of Richmond County against F. McLeod and James McLeod, executors of William McLeod, which came into the hands of Buchanan, as sheriff, in due time, to be collected before the return day; after the return day an *alias fi. fa.* was issued, but the debt was not collected on either of the executions. It was proved that the defendants were amply responsible for the debt while the sheriff held the execution, and continued to be so, and at the time of the trial were well able to pay the same. Upon these facts, the defendants insisted that they were liable only for nominal damages, and asked his Honor so to charge the jury, but he declined to do so, and instructed them to find the whole amount due. Defendants' counsel excepted. Verdict and judgment for the plaintiff. Appeal by the defendants.

No counsel for plaintiff in this Court.
Shepherd, Leitch, and McDonald for defendants.

MANLY, J. The measure of damages laid down by the court below is, upon the case stated, erroneous. *State v. Skinner,* 25 N. C., 564, is an authority in point. Upon the reasoning in that case, with which we are

entirely satisfied, the relator, in the suit before us, is entitled to nominal damages only. Where the debt is not lost by the officer's negligence, the relator is not entitled, by reason of that negligence, to recover the amount of the debt, and when he does not show any actual injury thereby sustained, he is entitled only to the damages which the law infers without proof, viz., nominal damages. The act of 1844, embodied in the Revised Code, ch. 78, sec. 3, alters the rule of damages declared in *Wood v. Skinner* in respect to a certain class of official negligences, and is restricted to that class. The statute provides that "When a claim shall be placed in the hands of any sheriff or constable for collection, and he shall not use due diligence in collecting the same, he shall (93) be liable for the full amount of the claim, notwithstanding the debtor may have been at all times, and is then, able to pay the amount thereof." This, manifestly, applies to those claims for debt within the jurisdiction of a justice of the peace, with the collection of which officers were then intrusted, and the penalty here provided was added in that class of cases, probably, upon the suggestion made in the opinion in the case above referred to, where it is intimated that some additional penalty might be required to secure official diligence in the collection of debts within the then greatly extended jurisdiction of a justice of the peace. The statute was not intended to apply to claims collected by process upon judgments in a court of record, the speedy collection of these being already insured by sufficient guards and penalties. These latter are not claims put into the sheriff's hands for collection within the purview of the statute, but are writs or processes upon which execution is to be done and official returns thereof made.

We think, therefore, that the authority of *Wood v. Skinner* stands—is applicable to the case before us, and disposes of it.

PER CURIAM. *Venire de novo.*

Cited: Brunhild v. Potter, 107 N. C., 419.

STATE TO THE USE OF GEORGE A. GRAHAM v. WILLIAM BUCHANAN ET AL.

1. An officer that has received the note of a *feme covert* within a magistrate's jurisdiction for collection is not guilty of negligence so as to subject him on his official bond in failing to take out a warrant on the claim.

2. Where the deputy of a sheriff received the bond of a married woman within a magistrate's jurisdiction for collection, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, it was *held* that there was no breach of the former sheriff's official bond.

(94) DEBT on official bond of sheriff, tried before *Saunders, J.*, at Spring Term, 1861, of RICHMOND.

The breaches of the bond assigned were the failure to collect a note on one Isabella McKay, placed in the hands of one Moorman, a deputy of the sheriff, for collection. (2) Collection of the money and failure to pay it over. There was an objection to the proper execution of the bond, declared on, which was filed at October Term, 1856, but as the facts relating to this point were all set forth and considered in the case of *McLean v. Buchanan,* 53 N. C., 445, it is deemed unnecessary to state them again.

As to the second breach, Moorman, the deputy, testified that in 1857 he was acting as the deputy of Buchanan when the paper in question was placed in his hands, and that Buchanan went out of office at October Term, 1857, when J. T. Bostick was appointed sheriff, and he, Moorman, continued as his deputy. While acting in this latter capacity he collected the money from Mrs. McKay. He stated further that Mrs. McKay was a married woman at the date of the execution of the note, and that her husband is still living, and, further, that he never sued out any warrant on the claim.

The court charged the jury that if they believed this evidence, the plaintiff was entitled to recover. Defendants' counsel excepted.

Verdict and judgment for plaintiff, and appeal by the defendants.

Ashe for plaintiff.
Shepherd, McDonald, and Leitch for defendants.

MANLY, J. We think there was no default of the officer, Buchanan, in respect to the claim in question, whereby he became liable on the bond of 1856. The facts are that the promissory note of a woman, under coverture at the time of its execution, for $27.50, was placed in the hands of the sheriff's deputy for collection, 23 September, 1857, and that the sheriff went out of office the third week of the following month.

No warrant was sued out for the collection of the demand, but (95) it continued in the hands of the deputy after the expiration of Buchanan's term, and in 1858 was collected by the deputy then acting under Buchanan's successor.

The collection of the money could not have been legally enforced by a warrant at any time, and it was not, therefore, incumbent on the officer, in acquitting himself of his duties, to sue out a warrant for the purpose.

While we hold in conformity with *Dunbar v. Doxey,* 52 N. C., 222, that if the money had been paid within the official term of Buchanan, his sureties would have been liable, we think it very clear, as it was not

paid, and the officer had no power to coerce its payment, that there has been no official negligence or breach of official duty whereby his sureties may be subjected to the payment of the debt or any part of it.

The instruction of the court, therefore, on this point, was erroneous, and should have been that, as there had been no breach of the conditions of the bond in suit, the relator could not recover upon it. This was settled in *Keck v. Coble,* 13 N. C., 49, and has been often reaffirmed since. *Miller v. Davis,* 29 N. C., 198; *Ringold v. McGowan,* 34 N. C., 44.

In the view above taken, we have assumed the validity of the bond. The objections to its proper execution have been already met in *McLean v. Buchanan,* 53 N. C., 445. Its sufficiency was there questioned upon the ground now alleged, duly considered by the Court, and affirmed. That case disposes of this point.

It may be proper to state that this last case was not known to the counsel taking the exception, because not published at the time. There should be a

Per Curiam. *Venire de novo.*

ROBERT J. McDOWELL, Treasurer, v. ANDREW HEMPHILL et al.

The treasurer of the trustees of Davidson College is not a corporation sole; on a bond, therefore, payable to one as such, and his successors, a suit cannot be sustained in the name of a successor.

This was an action of debt, tried before *Osborne, J.,* at Fall Term, 1860, of McDowell.

The plaintiff declared as successor on a bond, payable "to Thomas H. Robinson, treasurer of the trustees of Davidson College, and his successors," and on the trial below the judge ordered a nonsuit, from which plaintiff appealed.

Dickson for plaintiff.
Merrimon for defendant.

Pearson, C. J. We concur with his Honor in the opinion that the action cannot be maintained in the name of McDowell. In *Ferebee v. Saunders,* 25 N. C., 360, it was decided that "a bond taken by a clerk and master in pursuance of an order of the court, and made payable to him and his successors in office, must, on his death, be sued upon in the name of his personal representatives, there being no act of the Legislature requiring bonds to be made payable to him and his successors in office."

That case is decisive of the present action, and we suppose the attention of the counsel who issued the writ was not called to it. "The treasurer of the trustees of Davidson College" is not a *corporation sole,* and cannot be made so, except by an act of the Legislature. If there be any clause in the charter of the college having that effect, it should have been offered in evidence to the court. As the bond is payable to Thomas H. Robinson, the suit on it must be in his name, if he is living, or in that of his personal representatives, if he is dead.

PER CURIAM. Affirmed.

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(97)

ALICE SAUNDERS, WIDOW, v. DANIEL RUSSELL, ADMINISTRATOR.

An administrator has a right to appeal from an order of the county court affirming the year's allowance made to a widow.

THIS was a petition in behalf of the widow of the defendant's intestate for a year's provision out of her husband's estate. A decree theretofore had been duly had in the county court of Onslow. Commissioners were appointed to make the allotment; the allotment was made and returned to court, and on motion the same was confirmed and a decree made accordingly. Whereupon defendant appealed, on the ground that the allotment was excessive. On opening the case before *Heath, J.,* at Fall Term, 1861, of Onslow, the counsel of the petitioner moved to dismiss the appeal as having been improperly granted. On such motion the appeal was dismissed and a *procedendo* awarded to the county court; from which order the defendant appealed to this Court.

Green, Humphrey, and Person for plaintiff.
Moore for defendant.

PEARSON, C. J. It is provided, Revised Code, ch. 118, sec. 20: "Upon the return of the report, if the same be not excepted to by the administrator or next of kin, or any legatee, or, if excepted to and the exception be disposed of, the court shall make such *decree* therein as may seem to be right and proper."

Upon exception being taken by the administrator, or next of kin, or legatee, there are adversary parties—a suit is constituted in court, and from the decree either party may appeal according to the general law in respect to appeals.

The judgment in the Superior Court dismissing the appeal is

PER CURIAM. Reversed.

(98)

A. J. SUMMEY, COUNTY TRUSTEE, v. H. JOHNSTON ET AL.

A clerk can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years, where he has *admitted money to be due* in the manner prescribed by section 1, chapter 73, Revised Code.

MOTION for summary judgment, tried before *Osborne, J.,* at Fall Term, 1860, of BUNCOMBE.

This was an action beginning by motion, brought by plaintiff, as county trustee of Buncombe, to recover of the defendants as sureties to the official bond of W. T. Coleman, late clerk of the Superior Court of Buncombe, for moneys paid to their principal at April and October terms, 1851, in his official capacity. Mr. Coleman was sworn in as clerk at October Term, 1849, for four years. He went out of office in October, 1851, and died soon after. The amount alleged to be due was ascertained by an investigation and report of a committee of finance, which was admitted as proof, but no report of money in the office had been made by the clerk, and it was contended that the form of proceeding did not apply in this case, and the court being of this opinion, the plaintiff submitted to a nonsuit and appealed.

Gaither for plaintiff.
Merrimon for defendants.

PEARSON, C. J. We concur in the opinion of his Honor, that the summary mode of proceeding can only be resorted to where the clerk has *"admitted money to be due"* in the manner prescribed by Rev. Code, ch. 73, sec. 1. On a perusal of the statute, this is so clear as not to admit of discussion.

PER CURIAM. Affirmed.

(99)

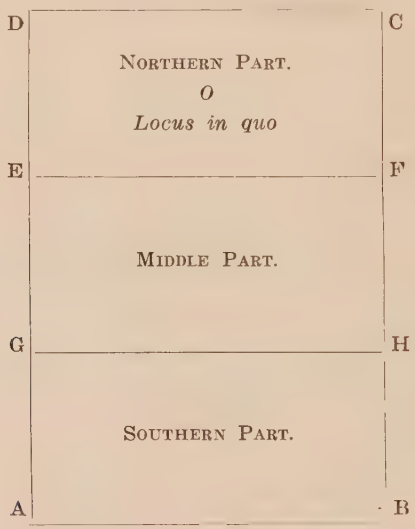
THOMAS T. NEWSOM v. SAMUEL KINNAMON.

Where A. owned a tract of land in the form of a parallelogram, of which he had an actual possession on one end and severed the two ends by selling a piece from the middle, and at the end of twenty-two years he conveyed the southern end to B., who continued the possession until the possession of the whole extended beyond thirty years, and then conveyed the northern end by a separate deed, but had no actual occupation of that end, it was *held* that holding it thus for more than thirty years was not sufficient to authorize the presumption of a grant to this northern end.

NEWSOM *v.* KINNAMON.

TRESPASS *q. c. f.*, tried before *Howard, J.*, at Fall Term, 1861, of FORSYTH.

The plaintiff offered in evidence a State grant for the tract E, F, C, D, covering the *locus in quo*, dated in December, 1859. The defendant admitted the trespass by clearing one acre of the land included within the boundary of the said grant since the issuing thereof.



The defendant read in evidence a deed from one Ashman to one Matthews, dated in 1823, for the whole tract, A, B, C, D; also a deed from Matthews to J. Newson for the same. The said Ashman and
(100) Matthews had actual possession of the southern end of this tract. In 1834 J. Newson conveyed to one Johnson the land contained in the diagram G, H, F, E, and Johnson, in 1840, conveyed the same to the plaintiff. The said J. Newsom, in 1845, conveyed the southern end of the land, A, B, H, G, to the defendant, and in 1846 he conveyed the northern end, E, F, C, D, to him, the defendant, also. The several deeds evidencing these transfers were produced and read in evidence. Ashman, Matthews, and the defendant continued the actual possession of the southern end of the land described, for more than thirty years continuously, but there was no actual occupation of the northern part, E, F, C, D, until the entry of the defendant, and clearing the one acre, as above described, for which this suit is brought, it being in forest.

Upon this state of the facts, his Honor instructed the jury that the plaintiff was entitled to recover. Defendant's counsel excepted. Verdict and judgment for the plaintiff, and appeal by the defendant.

Gorrell for plaintiff.
Gilmer and Starbuck for defendant.

PEARSON, C. J. We concur with his Honor that upon the facts stated the plaintiff was entitled to recover. In 1834 J. Newsom, under the deed of Matthews, having actual possession of the southern part of the tract, had possession of the whole. He then conveyed the middle part to Johnson, cutting the tract in two, so as completely to separate the southern part, where his possession was, from the northern part. From the view we take of the case, it is not necessary to decide whether the fact of his thus separating the two parts had the effect of confining his possession to the southern part, or whether he would still be considered as being also in possession of the northern part by force of the deed of Newsom; for, suppose he was still in possession of both parts, in 1845, he conveyed the southern part to the defendant, and no longer had any actual possession, so that he then had no ground on (101) which to claim to be in possession of the northern part, unless he had title from which a possession would be inferred, and the case is narrowed to this: Did he, in 1845, have title to the northern part?

The deed from Ashman to Matthews was in 1823, and a continued possession under that deed up to 1845 would only make twenty-two years, which is not long enough to *presume a grant.* So the title was still in the State. In *Reid v. Earnhart,* 32 N. C., 516, it is said: "In England a possession of sixty years is required, but the necessity of the rule and its manifest good policy in a new settled country induced our courts to shorten the time, and by successive decisions it has been reduced to fifty, forty, thirty years, and an intimation is made that it might be supported by twenty-five years." Thus it is seen that twenty-two years is not long enough. As in 1845 J. Newsom had no title to the northern part, and had conveyed away the middle and southern parts, he had no possession whatever, and the effect of his making a deed to the defendant for the northern part in 1846 could, on no principle, extend the possession of the defendant in the southern part, which he held under the deed of 1845, so as to put him in possession of the northern part, which he claimed under the deed of 1846, because he claimed under two distinct deeds, and had no actual possession of the northern part, the title to which was in the State, and there was, consequently, nothing to divest the title out of the State until 1859, when the plaintiff obtained a grant.

PER CURIAM. No error.

(102)

DOE ON THE DEMISE OF WILLIAM A. WILLIAMS ET AL. V. JOHN M. BEASLY ET AL.

1. Where a father, by deed, gave to his daughter and the heirs of her body a tract of land, and provided that "if the said daughter should die and leave an heir or heirs of her body, in that case, said heirs being her children or child, are to have, occupy, and possess all the property herein given, to them and their heirs forever," it was *held* that the children of the said daughter take as *purchasers*, and that the rule in *Shelley's case* does not apply.

2. Whether the rule in *Shelley's case* would apply where the limitation is to A. for life, remainder to the heirs of her body and their heirs, *quere*.

EJECTMENT, tried before *Bailey, J.*, at Fall Term, 1862, of CUMBERLAND.

The counsel for the parties, respectively, agreed on the following case:

In 1803, Jesse Potts made to his daughter, Nancy C. Potts, a deed, of which the following is the material parts relating to the case: "The said Jesse Potts as well for and in consideration of the natural love and affection which he hath and beareth unto the said Nancy C. Potts, his daughter, as also for the better maintenance and preferment of the said Nancy C. Potts, his daughter, agreeable to the conditions following, hath given, granted, and confirmed unto the said Nancy C. Potts that tract, etc. (describing it): *Provided*, my daughter Nancy C. Potts should have an heir or heirs of her body to live and survive; then and in that case all the property above given is to belong to the said heirs, to them and their heirs forever. But if it should so happen that my daughter should die and not leave any surviving heir or heirs of her body, in that case all the property is to descend back to the said Jesse and his heirs, the same as if the said land and other property had never been given to the said Nancy C. Potts. . . . But if the said Nancy C. Potts should die and leave an heir or heirs of her body, in that case, said heirs being her children or child, is to hold, occupy, and possess all the property herein given to them and their heirs forever." Nancy Potts
(103) was married to William H. Williams, and by him had two children, the lessors of the plaintiff. William H. Williams died in 1815, and under him the defendants claim. Nancy C. Williams died on 11 June, 1859. It is agreed that the defendants were in possession at the time of the beginning of the suit, and that the land sued for is that known as Springfield in the deed. The defendants and those under whom they claim have had possession of the land for forty years, claiming it as their own.

If the court shall be of opinion for the plaintiff, judgment is to be rendered for him; otherwise, for the defendant.

His Honor gave judgment for the plaintiff, and the defendants appealed to this Court.

W. McL. McKay for plaintiffs.
Shepherd for defendants.

PEARSON, C. J. The case turns upon the legal effect of the deed of Jesse Potts. We are of opinion that the clause, "but if the said Nancy C. Potts should die and leave an heir or heirs of her body, in that case said heirs, being *her children or child,* is to hold, occupy, and possess all the property herein given, to them and their heirs forever," together with the whole instrument, shows clearly that the words "heir or heirs of her body" are used in the sense of *child or children,* and the case is simply this: a life estate to Nancy C. Potts, with a remainder to her child or children and their heirs, but if she die leaving no child or children at her death, then over. So the children take as *purchasers,* and the rule in *Shelley's case* does not apply.

It is not necessary to consider whether the rule in *Shelley's case* would apply where the limitation is to A. for life, with remainder to the heirs of her body and their heirs; although we incline to the opinion that the rule would not apply, for, if it did, A. would take an estate tail, leaving the reversion in fee in the grantor. Whereas, the limitation to the heirs of her body, and *their heirs* forever, shows that the whole estate was granted, and no reversion was left in the grantor; so the heirs of her body would take a *different estate* by *purchase* from that which would come to them by descent as heirs of her body, and the rule, (104) it would seem, does not apply.

PER CURIAM. Affirmed.

Cited: Clark v. Cox, 115 N. C., 100; *Marsh v. Griffin,* 136 N. C., 335.

DOE ON THE DEMISE OF SAMUEL T. STANCEL v. SAMUEL CALVERT.

Where A. agreed to let B. put a sawmill and houses and fixtures on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished,* it was *held* that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege, were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Held, also,* that ejectment would lie to recover such an interest.

STANCEL *v.* CALVERT

EJECTMENT, tried before *Heath, J.*, at Fall Term, 1862, of NORTHAMPTON.

The action was brought to recover a "sawmill and fixtures situate on the land of John W. Stephenson," and of which the defendant had possession. Both parties claimed under one George R. Jordan, who held the property in dispute under the following sealed instrument, entered into by said Jordan and Stephenson:

"Know all men by these presents, that we, George R. Jordan and John W. Stephenson, have this day entered into the following agreement, viz.: That the said George R. Jordan wishes to put up on the lands of the said John W. Stephenson a sawmill with all the necessary fixtures, and agrees to let the said John W. Stephenson have all the manure that is raised by the stock on and around the said mill, in compensation for the use of the privilege of putting the mill and necessary fixtures thereon.

(105) "The said John W. Stephenson agrees on his part to let the said George R. Jordan have the privilege to use and enjoy the said land around the said mill as long as the said Jordan wishes to use the same for the purpose of carrying on the business of sawing timber at said mill; and when the said Jordan wishes to discontinue the business or wishes to remove the said mill, he shall have the right to remove the mill and all the fixtures, houses, and everything else he, the said Jordan, may have put thereon."

The plaintiff claimed under a judgment and execution issued from the county court, and a sale and deed therefor from the sheriff, who sold under the execution; the defendant claiming under a magistrate's judgment, execution, levy and sale by a constable, the levy not having been returned to court. The plaintiff's execution was first levied, but the sheriff did not remain in possession of the premises. The defendant's execution was then levied on the premises, and the officer remained in possession and advertised and sold, and the defendant purchased and took a deed therefor from the officer. The plaintiff then procured the sheriff to sell under his levy, when he purchased and took a deed from the sheriff. Jordan was living at the time of the trial. The foregoing facts were submitted to his Honor, with the understanding that he was to enter a judgment for the plaintiff or for the defendant, as the law might be for the one or the other.

His Honor, on consideration, gave judgment for the plaintiff, from which the defendant appealed.

Barnes for plaintiff.
No counsel for defendant.

BATTLE, J. We concur in the opinion expressed by his Honor in the court below, upon the facts agreed. The contract executed under the hands and seals of Jordan and Stephenson had the effect to make the former the owner of the houses, machinery, and other fixtures of the mill erected by him on the land of the latter, and also to give him an easement in the said land immediately around the mill, (106) so far as the same was necessary, for the business of sawing lumber. The quantity of estate or interest which Jordan thus acquired in the mill and land was certainly not a mere estate at will, because Stephenson had no right to put an end to it at pleasure, nor was it a lease for years for the want of certainty or of anything that could be reduced to a certainty in the time. It was, therefore, an estate for at least the life of Jordan, with a condition annexed, to be void as to the land upon his abandoning the milling business and taking off the houses and fixtures, as by the contract he was authorized to do. Such an interest could not be sold under an execution from a justice, without a return of the levy by the constable to court, an order of sale therein made, and a sale by the sheriff under such order. See Rev. Code, ch. 62, secs. 16 and 17. It follows that the levy and sale by the constable were void.

There can be no doubt of the propriety of the remedy by ejectment. It is settled that even the upper chambers of a house may be held separately from the soil on which it stands, and that an action of ejectment will lie to recover it. 4 Kent Com., 401, Note e; *Gilliam v. Bird,* 30 N. C., 280.

PER CURIAM. Affirmed.

Cited: S. c., 63 N. C., 617.

SCHEIFFELIN, HAINS & CO. v. J. M. STEVENS.

1. Where a partnership has had continuous dealings with a distant correspondent for some time, actual notice of its dissolution must be given to such correspondent to prevent a liability of all the members of the firm for subsequent dealings carried on by one of the partners in the name of the firm, though without the knowledge or consent of the late partners.

2. Publication of such notice in a local newspaper in this State was *held* not actual notice, nor was it evidence from which actual notice could be inferred.

ASSUMPSIT for goods sold and delivered, tried before *Osborne,* (107) *J.,* at Fall Term, 1861, of BUNCOMBE.

The plaintiffs were partners, dealing in drugs in the city of New York. The defendant and Boyd entered into a copartnership in the drug business in the town of Asheville, early in the year 1855, which was dissolved on 7 December in the same year, and notice thereof published in the *Spectator,* a newspaper printed in Asheville, for three weeks consecutively. The goods for which this action was brought were delivered to Boyd, in the name of Boyd & Stevens, in 1857 and 1858, the orders for the same having been made by Boyd in the partnership name without the knowledge or privity of Stevens. The plaintiff exhibited orders by the firm of Boyd & Stevens, on them, of date 14 June, 1855, 1 July, 1855, October, 1855, 16 November, 1855, and 5 December, 1855, before the dissolution, and of 12 March, 1856, 22 August, 1856, 15 September, 1856, 17 September, 1856, 6 February, 1857, 9 February, 1857, March, 1857, 29 August, 1857, 3 September, 1857, 9 October, 1857, 10 February, 1858, 12 March, 1858, 2 July, 1858. This evidence was offered to show a continuous dealing with the firm of Boyd & Stevens, both before and after the dissolution. A verdict was taken, by consent, subject to the opinion of the court on the law governing the case.

His Honor, on consideration, being of opinion with the defendant on the point of law, ordered a nonsuit, from which the plaintiffs appealed.

Merrimon for plaintiffs.
Gaither for defendant.

BATTLE, J. The point presented in this case is said by the counsel for the plaintiff not to be found adjudicated in any of the reports of this State. It is, however, well settled in the mercantile law of England and in New York and in Tennessee, and probably other States. See
(108) Collier Partnership, sec. 532 *et seq.,* and the cases referred to in the notes. In *Wardwell v. Haight,* 2 Barb. (N. Y.), 549, the rule is laid down precisely as is contended for by the counsel of the plaintiffs in this case. That rule is that when a partnership has had continuous dealings with a distant correspondent for some time, actual notice of its dissolution must be given to such correspondent to prevent a liability of all the members of the firm for subsequent dealings carried on by one of the partners in the name of the firm, though without the knowledge or consent of the late partners. The rule is reasonable and convenient, and we have no hesitation in recognizing it as a part of our law. It is founded upon a very general principle that where one of two persons must suffer a loss, he upon whom is imposed the duty of being active to prevent it shall bear it, where he has failed to put the other on his guard against it. Thus where a customer has been in the habit of sending his servant to purchase goods of his merchant on credit, and

afterwards sends him with money to buy other goods, the customer, and not the merchant, shall bear the loss in case his servant had, on the way, embezzled the money. So if a husband suffer his wife to take up goods on his credit, he shall still be liable, though he has forbidden her to deal in that way, unless he has notified the tradesman not to trust her.

Applying this principle to the case now before us, we think it was the duty of the partners in Asheville to give notice of the dissolution of their copartnership to their correspondents in New York, and that a publication of it in the *Asheville Spectator* was not actual notice, nor did it furnish any evidence from which such notice could be inferred. His Honor erred in deciding otherwise. The judgment must be

PER CURIAM. Reversed.

Cited: Ellison v. Sexton, 105 N. C., 360; *Straus v. Sparrow,* 148 N. C., 311.

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(109)

WILLIAM CLARK v. WESTERN NORTH CAROLINA RAILROAD.

Where it had been made to appear by the plaintiff's testimony that his horse had been injured on a railroad by the running of a train against it, and it was left doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on track, it was *held* that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled.

ACTION for negligence, tried before *Kerr, J.,* at Fall Term, 1862, of IREDELL.

The plaintiff claimed damages for injury done to his horses by defendant's agent negligently running the train of the railroad against them.

Christopher Clark testified that in November, 1860, when the train was passing near the residence of the witness, he saw a mule of the plaintiff passing over the track of the road, and at the time he heard the *station* whistle, and in a short time he heard the alarm whistle used to scare off stock; that the plaintiff's horses, which were injured, were on the side of the road opposite to that from which the mule came, and came upon the track; the alarm whistle continued to blow, and the horses started off on the track and ran away from the approaching train until they reached a cattle-guard, where they were overtaken and struck by the engine; that the train was stopped about 30 or 40 yards beyond the cattle-guard. He stated that the train was running at a moderate rate of speed when the mule crossed, and that the signal whistle for putting on the brakes was not sounded. He further stated that the grade of

the road was such at this point as admitted of the train being stopped quite readily, if proper effort had been made to do so; that he has known it stopped suddenly on the same ground, some time before that, to prevent a collision; that the train was 212 yards from where the horses were overtaken when the station whistle was blown. Another witness for the plaintiff testified substantially to the same facts.

(110) The defendant introduced one Roberts, the engineer in charge of the engine when the alleged injury was inflicted. He stated that while moving around a heavy curve in the road, at the rate of 20 miles an hour, which was the schedule rate, he saw before him, at a distance of about 50 yards, the plaintiff's horses on the track; that he was then in his proper position on the right of the engine; that the road curved to the left at this point, and his position on the right of the engine was unfavorable for seeing far ahead on account of the smoke-stack and the lamp which obstructed his view; that as soon as he saw the horses he *immediately blew the whistle for the brake and reversed the engine,* and he also blew the alarm whistle for driving off stock; that before he could get the engine stopped it struck the horses; that the train continued running for 30 or 40 yards before he could stop it. He further stated that he was running upon a heavy down-grade with five cars attached; that he did all in his power to stop the train, and that under the circumstances it was impossible for him to have done so sooner than he did.

Another witness by the name of Cox, who was also an engineer, stated that he was on the train at the time, near the engineer, and he gave substantially the same statement with Roberts.

The plaintiff then recalled his witness Clark and offered to prove by him that he, plaintiff, in company with witness, had an interview with Dr. Powell, president of the railroad company, soon after the injury was done, and upon plaintiff's representation of the extent of the injury and the manner of its occurrence, Dr. Powell advised him to kill one of the horses and then to have both of them valued by two freeholders, and, if one of the horses should get well, to have them valued again in like manner, which was done accordingly. This evidence was objected to by the defendant, but admitted by the court. Defendant excepted. The action was commenced within six months after the injury sustained.

The court charged the jury that by the act of 1856, after the injury was satisfactorily shown by the plaintiff, it devolved upon the

(111) defendant to prove that it did not result from the negligence of the defendants' agents; that in law the defendants were required to show that everything had been done which, under the circumstances, it was possible to do to prevent the injury; that in the opinion of the court the brake ought to have been applied to aid in stopping the train

when it was discovered that the horses were on the track; that there was no evidence that the brakes were so applied, the testimony being only that the whistle was blown as a signal for the brakes to be put on, and that the want of such proof left the presumption of negligence still standing against the defendant.

The defendant's counsel asked the court to instruct the jury that they had a right to *infer* that the brakes were applied from the testimony of Roberts and Cox.

This the court refused to do, but stated to the jury that, notwithstanding what Roberts and Cox had testified, the plaintiff was entitled to recover. Defendant excepted to the charge. Verdict for the plaintiff. Judgment, and appeal by the defendant.

Mitchell and Boyden for plaintiff.
Moore for defendant.

BATTLE, J. We are unable to discover any error in the charge of his Honor of which the defendant can complain. The act of 1856, chapter 7, makes the mere fact of killing cattle or other live stock by the engine or cars of a railroad company *prima facie* evidence of negligence on the part of such company. Proof of having killed the plaintiff's horse, then, having been made, the force of that law is to declare that the company's agents were guilty of negligence, of which they could not acquit themselves except by showing that there was no neglect whatever. It is not sufficient for them to prove that there was probably no negligence. They are put by the law under the heavy burden of proving affirmatively a negative. The difficulty of such a position is strongly exemplified in *S. v. Patton,* 27 N. C., 180, and *S. v. Goode,* 32 (112) N. C., 49, decided under the law which made the examination of the mother of a bastard child *prima facie* evidence of its paternity. In the case before us, we think, for the reasons given by his Honor in the court below, that the *prima facie* case made by the plaintiff was not overthrown by the testimony given for the defendant. His Honor might, perhaps, have gone further and stated that the engineer, himself, had shown some neglect by not having placed himself in such a position that he could see along the curve of the road around which the cars were running. Of that, however, the facts stated do not enable us to give a definite opinion.

PER CURIAM. No error.

Cited: Battle v. R. R., 66 N. C., 344; *Pippen v. R. R.,* 75 N. C., 58; *Doggett v. R. R.,* 81 N. C., 466; *Winslow v. R. R.,* 90 N. C., 74; *Baker v. R. R.,* 133 N. C., 34.

ANDREW COPE v. ANDREW BRYSON.

1. Where a defendant in a justice's warrant, after a trial and judgment against him, but before the appeal was tried, paid a part of the claim to the justice, who held it till the trial above took place, and then paid it to the officer of the appellate court, it was *held* that under the pleas "tender and refusal" and "always ready," the measure was unavailing.

2. The proper way for a defendant to avail himself of a payment into court is to have a rule of court to permit him to do so.

3. Whether a justice of the peace can make a rule to pay money into his hands which will avail in an appellate court, *quere.*

ASSUMPSIT, tried before *Dick, J.*, at Spring Term, 1861, of JACKSON.

The suit was commenced before a justice of the peace on a book account for $2.50 and an order purporting to be given by the defendant to the plaintiff. The account was admitted by the defendant, but the order was disputed. The justice gave judgment for both claims, and the defendant prayed and obtained an appeal to the Superior Court,
(113) and he then, in the same presence, but after the judgment and appeal, tendered to the plaintiff $6 in gold and silver, which was sufficient to cover the $2.50 and the costs then due, which was refused by the plaintiff. The defendant then handed the money to the magistrate and gave surety for the appeal. The appeal was returned to the court, and the defendant appeared and pleaded "General issue, payment, tender and refusal, always ready." The cause was continued on the docket for several terms, and a large amount of costs accumulated. At the trial term, on the day before the trial, the magistrate gave the money to the clerk of the court, having retained it till then, and the clerk produced the money on the trial.

The plaintiff, on the trial, offered no evidence as to the sum claimed under the order, but asked for a verdict and judgment for the $2.50 admitted to be due. His Honor charged the jury that if they believed from the testimony that the amount tendered was sufficient to pay the $2.50 and the costs due at the time of the trial before the magistrate, the defendant was entitled to a verdict. Plaintiff excepted.

Verdict and judgment for defendant. Appeal by plaintiff.

Merrimon for plaintiff.
No counsel in this Court for defendant.

PEARSON, C. J. We presume the attention of his Honor was not called to *Murray v. Windley,* 29 N. C., 201; *Winningham v. Redding,* 51 N. C., 126, where the point is directly decided against the defendant. The defendant ought, as soon as the appeal was returned to the county

court, to have paid the money, which he admitted to be due, for principal, interest, and costs, into court, and taken a rule on the plaintiff "to take the money or proceed further in the case at his peril."

Possibly it was in the power of the justice of the peace who tried the case to grant such a rule on the payment of the money to him before the appeal was taken, and at first it occurred to us that the ruling of his Honor might be supported on that ground, but the justice made no entry of the kind on the judgment, and the defendant (114) went to trial on the pleas "general issue," "payment," "tender and refusal," "always ready," and the money was not paid in by the justice until the trial term. Upon these facts and the *pleading,* his Honor erred in his charge to the jury. To have availed himself of the fact that the justice had received the money before the appeal was granted, the defendant ought to have brought it to the notice of the court when the appeal was returned, and taken the rule on the plaintiff; or else to have obtained leave for the justice of the peace to make the entry on the judgment and pay the money into court, so as to allow the plaintiff then "to take the money or proceed further at his peril." Instead of that, the justice of the peace is allowed to keep the money, and the defendant relies on the plea of "tender and refusal, always ready," which plea can only be supported by proof that the money was tendered before the action was commenced. See the cases above cited. There is error.

PER CURIAM. *Venire de novo.*

Cited: Parker v. Beasley, 116 N. C., 7; *DeBruhl v. Hood,* 156 N. C., 53.

DOE ON DEMISE OF D. M. SINCLAIR v. K. H. WORTHY.

1. In ejectment a landlord who is permitted to defend the suit in the place of his tenant is confined to the same defense as his tenant would have been confined to.

2. In an action of ejectment against the debtor by a purchaser at sheriff's sale, the defendant needs only a judgment, execution, and sheriff's deed.

3. There is no principle of law or practice of the courts by which, after a plaintiff in ejectment has obtained a judgment against the tenant in possession, upon whom a declaration has been served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession on the suggestion that the title was in some other person.

(115) EJECTMENT, tried before *French, J.*, at Fall Term, 1860, of MOORE.

The declaration was served on Duncan Murchison, Leonard Farr, and Henry Oldham, and at the appearance term K. H. Worthy was permitted to come in as landlord and defend the suit. The lessor of the plaintiff offered in evidence a judgment and execution against Duncan Murchison, a levy and sale in 1857 of the land described in the declaration, a purchase by him for $15, and a sheriff's deed for the same. The defendant then showed a sale by the sheriff for the same land as the property of Duncan Murchison, and a purchase of it by him for $2,000, in July, 1856, and a sheriff's deed to him of that date, reciting a judgment and execution against Duncan Murchison and a sale to him, and showed that a short time after the sale Duncan Murchison agreed with the defendant that if he, the defendant, would not turn him out of possession, he would hold the land as his (defendant's) tenant, and Murchison then became his tenant and held the land of him until his death, in 1857, and was so holding the land when the plaintiff purchased and at the time of the service of the declaration, and that defendant had been in possession, by himself or his tenants, from the time of his purchase, in 1856, up to the time of the trial. The court charged the jury that as the lessor of the plaintiff had showed a judgment and execution against Duncan Murchison, upon whom the declaration was served, a levy and sale, a purchase by the lessor of the plaintiff and a sheriff's deed, the plaintiff was entitled to their verdict, and that in this action it could avail the defendant nothing to show title to the land sued for. Defendant's counsel excepted. Verdict for plaintiff, and judgment and appeal by the defendant.

The record proper sets out that the plaintiff moved for a writ of possession to issue, which was opposed by the defendant, upon affidavits filed, which were considered by the court sufficient, and he moved that the writ of possession should be stayed until the lessor of the plaintiff should bring his action of ejectment against the present defendant, and until the termination of such action. This motion was sustained
(116) on condition that the defendant, in the future action, should admit possession of the premises, from which order the plaintiff appealed.

Haughton for plaintiff.
Strange, McDonald, and W. McL. McKay for defendant.

PEARSON, C. J. From the manner in which the record is made out, we are at a loss to determine whether this is an appeal by the defendant from the ruling of his Honor on the trial of the action of ejectment, or

an appeal by the plaintiff from the order staying the writ of possession until the lessor of the plaintiff should bring his action of ejectment against the defendant. But for the fact that the case made out by his Honor is sent as part of the record, we should conclude that the only point presented was on the appeal of the plaintiff in regard to the motion to stay the writ of possession, and that the confusion is to be ascribed to an attempt on the part of the clerk to insert the proceeding in respect to the order staying the writ of possession as of Fall Term, 1860. We will take it, however, that both matters are brought up for review.

There is no error in the ruling of his Honor on the trial of the action of ejectment. The facts bring this case within the doctrine that when a landlord defends in place of his tenant, he can make only such defense as his tenant could make, and that in an action of ejectment by a purchaser at sheriff's sale against the debtor in the execution, he need only show a judgment, execution, and sheriff's deed. This is the general rule, and the case does not come within the exception made under the peculiar circumstances presented in *Jordan v. Marsh,* 31 N. C., 234; so we conclude with his Honor, that the plaintiff was entitled to recover.

But we do not concur with him in his holding on the motion to stay the writ of possession. We are not aware of any principle of law or practice of the courts by which, after a plaintiff in ejectment has obtained judgment against the *tenant in possession,* upon (117) whom the declaration in ejectment has been duly served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession, on a suggestion that the title is in some other person. We were informed on the argument that his Honor supposed the order to stay the execution was warranted by the opinion in *Judge v. Houston,* 34 N. C., 108. Such a conclusion was not warranted by that opinion, and shows that it was totally misapprehended. In that case the declaration in ejectment was not duly served on the *tenant in possession,* but was served on one who was only a *guest* or *servant* of the persons really in possession, and it was held that the latter, who had received no notice of the action and had no right or opportunity of making defense, should be turned out of possession under a judgment obtained against the guest or servant. But in this case the declaration was served on the *person really in possession;* so the opinion in that case had not the slightest application.

We are glad of an opportunity to correct this misapprehension, for, if the practice should prevail of staying the writ of possession in all cases where the landlord defends in place of his tenants, the rule that he is confined to such defense as his tenant could make, and that a pur-

chaser at sheriff's sale, as against the debtor in the execution, need only show a judgment, execution, and sheriff's deed, would be completely eluded.

PER CURIAM. Judgment in the action of ejectment confirmed. The order staying the writ of possession reversed.

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(118)

DOE ON THE DEMISE OF A. AND E. KRON v. BENJAMIN CAGLE.

Where a tract of land had marked trees all around it, demarking 300 acres, and one held a small isolated parcel within these bounds for five years, and there was no evidence to connect him with the marked trees or the grant under which the marks were made, it was *held* that he had not *prima facie* evidence of title to the land according to these bounds under the act of 1850.

EJECTMENT, tried before *Howard, J.*, at Fall Term, 1861, of MONTGOMERY.

The plaintiffs offered in evidence a grant to one James Noll, 1799, for the land in dispute, and proved that in 1831 one Burrage built a small house on it and occupied the same, cultivating a field around the house, and while there hunted and dug for gold on the land by the permission of Delamotte (as he stated); that there were marked trees all around the tract; that in 1832 one Ferrill occupied the house; that it was then vacant until December, 1834, when Ferrill returned and took possession, telling the witness that he had a house at last where he felt settled; that he had been put there by Delamotte. Ferrill continued to live on the land from December, 1834, to August, 1845, when he was ejected at the instance of the lessors of the plaintiff. The plaintiffs are the devisees of the land under the will of Delamotte, which was duly proved. He died in 1838. These facts, and others not material to the point considered by the Court, were submitted to his Honor. The question raised by the counsel was whether the possession of Ferrill, as tenant for Delamotte for five years, was *prima facie* evidence of title under the act of 1850.

Judgment for the defendant, and the plaintiffs appealed.

Ashe for plaintiffs.
Strange for defendant.

(119) PEARSON, C. J. An objection presents itself *in limine*, which is fatal to the plaintiff's case. There is no evidence that Delamotte ever had a deed, or in any manner claimed to derive title under

Noll. So there is nothing to show that he held or claimed according to the boundaries of the grant to Noll, or to connect his title with the marked trees around that grant. He may have claimed up to some line, including a fourth or a half, or any indefinite part of the land covered by the Noll grant, or his claim may have extended outside of that grant to any other lines or boundaries. In other words, there is no evidence to fix the boundaries according to which Delamotte claimed.

The fact that, in 1799, a grant issued to one James Noll for 300 acres of land, and that there were marked trees all around it, and that in 1834 Delamotte put one Ferrill in possession of a piece of land inside of these marked trees, and Ferrill lived there as Delamotte's tenant for more than five years and cleared a few acres of land, is no evidence of the allegation that Delamotte held and claimed according to the lines which had been marked for the grant to Noll, in the absence of any proof whatever to connect his title with the grant or to show that he had ever seen or heard of it, or knew anything about the marked trees around it.

The evidence does not bring the plaintiff's case within the provisions of the statute relied on, chapter 68, section 12, Laws 1850, which is in these words: "Peaceable possession of land, although no color of title be shown, for five years, shall be *prima facie* evidence of title, where persons may *hold or claim* under known and visible metes and bounds." There is no evidence that Delamotte did hold or claim under known and visible metes or bounds, and there is nothing to show the extent of his claim. There is no error.

Per Curiam. Affirmed.

Cited: Smith v. Kron, 96 N. C., 396.

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(120)

Doe on the Demise of JOHN McDOUGALD v. ALLEN McLEAN.

1. A person whose land has been sold at sheriff's sale is a competent witness, in an action of ejectment against the purchaser at such sale, to show that his own title was defective.

2. Any one who had an opportunity of knowing and observing a person whose sanity is impeached, though he may not be an attesting witness, may give his opinion of such a person's capacity to make a deed or will.

3. Where it is established that the deed offered by one of the parties in ejectment, claiming under the same person with the other, is void, he is not estopped from denying the title of the other party.

EJECTMENT, tried before *Howard, J.*, at Fall Term, 1861, of HARNETT.

The plaintiff's declaration included three tracts or pieces of land. The lessors of the plaintiff showed by grant and deeds a good title to two of the tracts in one Hugh McDougald, the death of McDougald, and that they were his heirs at law. They also showed the possession of the defendant, at the time the declaration was served, of all three tracts, but offered no evidence of title as to the third tract.

The defendant then offered in evidence a deed from Hugh McDougald to one McPhail, a judgment, execution, levy, sale, etc., as the property of McPhail, and a sheriff's deed to himself. The deed of Hugh McDougald and the sale and deed of the sheriff covered all three tracts.

The plaintiff then offered evidence of Hugh McDougald's incapacity to make the deed. Among his witnesses, he tendered McPhail, to whom the deed was made. The defendant objected, but the objection was overruled, and defendant excepted.

One Atkins was introduced as a witness. He stated that he had been deputy sheriff during the year in which the deed was made; that he knew McDougald, and did some business with him. The plaintiff proposed asking the witness "whether, in his opinion, McDougald was, during that year, competent to transact business or make a deed."

The defendant's counsel objected to the question, and insisted that Atkins, not being a witness to the deed, could only describe the
(121) acts and sayings of McDougald, and was not, in law, allowed to express his opinion. The witness was permitted to give his opinion, which was that he did not think he had mind enough to protect himself. Defendant excepted.

The court charged the jury that as the defendant produced the deed from McDougald and claimed title from him through McPhail, he was estopped from denying his title, and, therefore, if they were satisfied that McDougald was not competent to make a deed at the time the deed purported to have been made, the plaintiff was entitled to recover not only the two tracts, but the third also. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

N. McKay for plaintiff.
W. B. Wright and Buxton for defendant.

BATTLE, J. The objections to the competency of testimony were untenable, and his Honor was right in so deciding.

1. McPhail was competent to testify for the plaintiff. His testimony was against his interest. In proving that the deed from McDougald to him was void on account of the incapacity of the grantor to make it, he

showed that he was liable to the defendant, who was the purchaser of the land as his, under a sheriff's sale. See Rev. Code, ch. 45, sec. 27.

2. *Clary v. Clary,* 24 N. C., 78, has settled the rule that in the case of a deed as well as of a will any witness, though he may not be an attesting one, who has had opportunities of knowing and observing a person whose sanity is impeached may not only depose to the facts within his knowledge, but he may also give his opinion as to the sanity or insanity of such person.

Upon the question of estoppel, his Honor's opinion was wrong. If the deed from McDougald to McPhail was a nullity because of the grantor's insanity, we cannot see how it could estop the grantee or any person claiming under him. It certainly did not estop the grantor, and a primary rule in the doctrine of estoppels is that, to be of any (122) force, they must be mutual. Hence the defendant was not estopped to take advantage of the fact that the plaintiff's lessors could not show title to the third tract of land described in the plaintiff's declaration. It was error, then, in the court to instruct the jury that the lessors were entitled to recover that tract, and for the error thus committed the judgment must be reversed and a

PER CURIAM. *Venire de novo.*

Cited: Drake v. Howell, 133 N. C., 167; *In re Peterson,* 136 N. C., 29.

STATE ON THE RELATION OF A. R. SHIPMAN v. JESSE MCMINN.

Where the record of the county court showed that A. was appointed a constable for one year, and it was proved that he acted as such during the year ensuing, although the condition of the bond did not express the term for which he was appointed, and although the appointment was not made at the term prescribed by law for appointing constables, yet it was *held* that he and his sureties were liable for a breach of the bond occurring within the year ensuing.

DEBT on a constable's bond, tried before *Osborne, J.,* at Fall Term, 1860, of HENDERSON.

It appeared that at October Term, 1856, of Henderson County Court the defendant was appointed constable for one year, and filed the bond on which this suit was brought. The bond was in the ordinary form, with a condition to perform the duties of constable, without specifying the term of his office. It further appeared that the regular term for the appointment of constables, by the statute, was at the county court held

on the first Monday after the fourth Monday in December. The claim was put in the hands of the defendant in March, 1857, and the breach occurred within the year after the appointment of the defendant.

(123) Upon this state of facts his Honor held that the defendant was liable on his official bond, and so instructed the jury, who found a verdict for the plaintiff. Judgment was given for the plaintiff, and the defendant appealed to the Supreme Court.

Merrimon for plaintiff.
No counsel for defendant.

BATTLE, J. The principle of this case is identical with that of *Hoell v. Cobb,* 49 N. C., 258, and the decision must be the same. The only difference in the facts of the two cases is that in the former it was stated in the official bond of the constable, as well as in the record of his appointment, that he was chosen for one year. In the present case it appears upon the record that he was appointed for one year, though the bond does not recite the duration of office. But it was proved that he continued to act under color of his office during the year, and that is sufficient to render him and his sureties liable by force of section 9, chapter 78, Rev. Code. The policy of that law is to render the sureties of a constable liable for his official delinquencies, rather than to subject those who may have put claims into his hands for collection to suffer loss, though he may be acting under an irregular or invalid appointment.

PER CURIAM. Affirmed.

DOE ON THE DEMISE OF NANCY LEATHERWOOD v. JOHN BOYD.

Where the certificate of probate to a will set forth that it was proved in common form by the oath of A., one of the subscribing witnesses, and then proceeded to state what the witness swore to, and there was no assertion among these particulars that A. subscribed the will as a witness in the presence of the testator, it was *held* that the probate was defective.

(124) EJECTMENT, tried before *Dick, J.,* at Spring Term, 1861, of HAYWOOD.

The lessor of the plaintiff adduced his title regularly to John Leatherwood, whose will conveying the same to her, was offered in evidence, but objected to for the want of a due probate. The certificate of the probate of the will was as follows:

"The last will and testament of John Leatherwood, deceased, was duly proven in common form by the oath of Rufus A. Edmonston, one of the

subscribing witnesses thereto, who swears that he saw the said John Leatherwood sign and seal said paper-writing, and declared it to be his last will and testament, and at the time thereof was of sound, disposing mind and memory, and that he done it freely and without compulsion. Sworn in open court, which was ordered to be spread at length on the paper-book kept for that purpose."

The evidence was admitted, and defendant excepted. The will had two subscribing witnesses to it, and it was objected that the probate was made by one only. This objection was overruled, and defendant excepted.

Verdict and judgment for plaintiff, and appeal by defendant.

No counsel for plaintiff.
Merrimon for defendant.

PEARSON, C. J. We are of opinion that the probate of the will of John Leatherwood was not sufficient according to the certificate, and it was, consequently, error to permit the will to be read in evidence. Had the certificate stopped after these words, "The last will and testament of John Leatherwood was duly proved in common form by the oath of Rufus A. Edmonston, one of the subscribing witnesses thereto," it would have been sufficient in this view of the question (*Marshall v. Fisher,* 46 N. C., 111; *Beckwith v. Lamb,* 35 N. C., 400; *University v. Blount,* 4 N. C., 13), on the ground that every court, where the subject-matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there is something on the face of the proceeding to show to the contrary; for the presumption is that the court knew how to take the probate of a will, (125) and saw that it was properly done. But if there be anything on the face of the proceeding to show the contrary, that will rebut the presumption. In *Carrier v. Hampton,* 33 N. C., 307, the probate of a deed was before a judge of the Superior Court, and he certified "that Jefferson S. Hampton, being duly sworn, testified that Edmund Tomberlin, the subscribing witness to the within bill of sale, is dead, and that the signature of Jonathan Hampton, the grantor therein, is in the proper handwriting of the said grantor." It is held that the probate was not sufficient, because the judge professes to set out what was sworn by the witness, and on the face of the proceeding it appeared that the probate was defective in this, that the witness did not state upon what ground he founded his opinion, nor by what means he had acquired a knowledge of the handwriting of the party. In our case the certificate professes to set out what was sworn to by the witness Edmonston, *i. e.,* "who swears that he saw the said John Leatherwood sign and seal said paper-writing,

and declared it to be his last will and testament, and at the time thereof was of sound and disposing mind and memory, and that he done it freely and without compulsion. Sworn in open court." So it appears on the face of this proceeding that the probate was defective in this: the witness did not state that he subscribed the will, as a witness, in the presence of the testator, which is an essential requisite in the due execution of a will to pass land. The omission of this fact, where particulars are entered into, rebuts the presumption that would otherwise have been made under the maxim *omnia presumuntur rite esse acta;* consequently the probate as it now appears must be held to be defective. Should the fact be that the witness did swear that he subscribed the will as a witness, in the presence of the testator, and the omission to set it out was a misprision of the clerk, the county court may permit an amendment so as to make its records speak the
(126) truth, and in that way put the matter right. For this error there must be a *venire de novo.*

We do not see proper to notice the objection that the will was proven by only one witness, whereas by the Revised Code it is necessary that it should be proved by at least two witnesses, because it is not necessary for the purpose of this decision, and from the statement of the case made by his Honor it does not appear *at what time* the will was admitted to probate; for if it was done before the Revised Code went into operation, the probate by one of the subscribing witnesses was sufficient. How that fact is will, of course, be set out if the case should come up again.

PER CURIAM. Error.

Cited: Howell v. Ray, 92 N. C., 514; *S. v. Jones,* 93 N. C., 618; *Cowles v. Reavis,* 109 N. C., 421.

STATE v. HENRY YOUNG AND COSBY YOUNG.

Where a person suspected of a murder was arrested and brought before a jury of inquest as a witness and subjected to a rigid examination, it was *held* that this examination was not competent evidence against him on a trial for the offense.

INDICTMENT for murder, tried before *Saunders, J.,* at Fall Term, 1861, of MACON.

The prisoners were indicted for the murder of John Wesley Jenks. On an inquest over the body of the deceased, the wife of one of the prisoners had left the place and gone in the direction of the residences of the prisoners, in order, it was suspected, that she might give them notice

to escape; and in order to prevent this, and to avoid alarming them, they were arrested as witnesses by the deputy sheriff (several of the jury acting as his assistants) and brought to the place of holding the inquest. They were then sworn as witnesses and subjected to a rigid examination, which, in many of its particulars, were supposed to implicate them in the homicide. They were then charged with the crime, and on the trial in the Superior Court the solicitor for the State offered (127) to read in evidence the examination of the prisoners before the jury of inquest. This was objected to by the counsel for the defendant, but admitted by the court. Defendants' counsel excepted.

There was a verdict of guilty, a judgment, and an appeal by the defendants.

Attorney-General for the State.
No counsel for defendants.

BATTLE, J. There are very few questions in which there is a greater conflict of judicial decisions than in that whether the statement made on oath by a person while under examination as a witness before a coroner's inquest or an examining magistrate can afterwards be used as evidence against him upon an indictment for the same offense as that as to which he has been examined. In Roscoe's Crim. Ev., pp. 49 and 50, references to many of these conflicting cases may be found. Mr. Phillips, in the last edition of his valuable treatise on evidence, after referring to most of the cases on the subject, endeavored to draw a distinction between the case where the prisoner was in custody, or was under suspicion, and where he was examined against another party under a distinct charge (see 1 Phil. Ev., 404). Mr. Roscoe, in remarking upon the distinction, says that in none of the recent cases had it been adverted to as the ground of decision. He then closes his observations on the subject by the remark that "the ground on which a deposition, upon oath, by a prisoner, has been generally considered to be inadmissible, without reference to the circumstances under which it is made, is that, being upon oath, it cannot be looked upon as a voluntary statement, although it undoubtedly strengthens the objection to such a deposition that the party is in custody or under suspicion at the time."

In *S. v. Broughton,* 29 N. C., 96, the prisoner had been exam- (128) ined as a witness before the grand jury, who were investigating the case of alleged murder, and had given evidence tending to fix the charge on another person. He was afterwards suspected and indicted for the crime, and his testimony, as given before the grand jury, was offered as evidence against him. The Court said that if the evidence offered had purported to be a confession, it could not have been admitted,

because, being under oath, it could not have been deemed voluntary; but as a statement tending to criminate another person, it was admissible against him, and the falsity of it, taken in connection with other circumstances, was relied on as evidence of his guilt. There the prisoner at the time when he was examined was not under arrest, in which respect the case differs from the one now before us. *Rex v. Lewis,* 6 C. and P., 161 (25 Eng. C. L., 333), approaches in its circumstances to our case. There the prisoner, Coelia Lewis, was indicted for an attempt to poison. It appeared that on the day on which she was committed she had been summoned as a witness, along with others, to give evidence before a magistrate. At first, she was not suspected, but on the conclusion of her examination she was committed for trial on the same charge. In her examination she had referred to a letter produced by her, and on her trial it was proposed to be proved, on the part of the prosecution, what she had said about the letter. *Gurney, Baron,* refused to receive the testimony, saying that it was in her written examination. It was then proposed to give evidence of what the prisoner said, which was not taken down, and this was also refused by the judge. Here it will be noticed that the evidence which was ruled out is not stated to have been a confession of the prisoner's guilt, and the ground upon which it was rejected must have been that the prisoner's statement was made while she was on examination on oath. The circumstances of the case now before us are still stronger to show that the prisoners were under restraint in giving their testimony. They were suspected of having committed the homi-
cide, were under arrest, and were subjected, as the bill of excep-
(129) tions states, to a rigid examination. Although treated as wit-
nesses, they were, in truth, prisoners under examination, and as such nothing which they stated under oath ought to have been admitted in evidence against them (see Roscoe Crim. Ev., 61). The judgment must be reversed and a

PER CURIAM. *Venire de novo.*

Cited: S. v. Wright, 61 N. C., 488; *S. v. Matthews,* 66 N. C., 110; *S. v. Grady,* 83 N. C., 645; *S. v. Parker,* 132 N. C., 1018.

STATE v. JACOB W. MURPH.

1. It is no ground for a challenge to the array, in a capital case, that it does not appear from an order for a special *venire facias* that it was made in the case of the prisoner. It is sufficient if it appear that it was made at the term at which the trial was had.

2. A challenge to the array of jurors is generally founded on a charge of partiality, or some default in the sheriff or other officer summoning them.

3. Whether, where the manner of a homicide charged in a bill of indictment is by cutting the throat of the deceased with a knife, and the proof is that it was done by blows inflicted on the head with a gun, the variance is material, *quere*.

4. The court is not bound to give special instructions to the jury, at the request of counsel, on a hypothetical case.

INDICTMENT for murder, tried before *Kerr, J.*, at Fall Term, 1862, of ROWAN.

The defendant was indicted for the killing of one John Cope, by cutting his throat with a knife, and in the same bill one Wilson McGrady was indicted for aiding and assisting in the same homicide. The case was removed to Rowan from the county of Cabarrus.

Upon the trial, one Mary Cope, wife of the deceased, testified that on Sunday, 8 December, 1861, Jacob Murph came to the house of the other defendant, McGrady, about 8 o'clock in the morning; that shortly thereafter Cope, the deceased, came to the same place in a buggy, (130) and she went out to meet him, and found that he had put his horse in the stable; he and McGrady were brothers-in-law; that in a short time Cope concluded that he would leave the place, and went to the stable to get his horse for that purpose, and witness went with him, but found the horse sick and unfit to be used; that they then returned to the house and found McGrady standing near the corner of the house; they (witness and her husband) entered the building and were standing near the door when Murph came up with a gun under his arm, pointing towards witness and deceased; that Murph said, "Good evening," to which Cope said, "Good evening, G—d damn you; I will kill you"; that Cope then turned towards the prisoner and seized the gun, and succeeded in wresting it from the prisoner's hands; that the prisoner stepped back a little, and Cope fired the gun at him; that the witness then stepped back a little and took a seat in the house where she could not see the parties; that she heard the noise of a scuffle between them, and heard the sound of heavy blows, and heard the deceased say, "Oh, don't!" She also heard the prisoner say, "I have cut his damned throat"; that a few minutes afterwards she heard him say, "We will take him and put him in the smokehouse, and then we will carry him to Beaty's old field"; that she heard chopping at the smokehouse, and saw McGrady coming from towards the stable, and on his going to the smokehouse, Murph again said, "We will put him into the smokehouse until night, and then take him to Beaty's old field"; this was about 2 o'clock in the evening; she got supper about sundown, of which the prisoner and McGrady partook, and then the former left the house and went off; but before he went, he

told witness that if any one came there and inquired for him, to say that he had not been there since Thursday, and said further, "If you tell anybody what has happened, we will kill you"; that the prisoner did not return to McGrady's until 12 or 1 o'clock that night; that as soon as he came back he said to McGrady, "It is time to go"; that she, in a short time, heard the tramping of a horse in the yard and the noise of
(131) a buggy, and then Murph and McGrady went away and did not return till about 3 o'clock, and that they then made up a fire and sat until about day, when Murph went off again; the gun to which witness referred was the property of the prisoner, which he carried away with him when he left on Monday morning; it was a rifle. This witness also testified that on Sunday before the killing took place, Cope told her that he intended to kill Murph wherever he met him, and that she had told Murph of this threat. The witness further stated that Murph, the prisoner, was in the habit of having his washing done at McGrady's, and frequently left his gun there.

(133) The State offered in evidence a letter, purporting to be from the prisoner, addressed to Mary Cope, wife of the deceased, which was objected to by the prisoner's counsel, but the State examined the witness, G. L. Gibson, touching the origin of the letter, who stated that while Murph was in jail, in Concord, he requested witness to go to the postoffice and inquire for a letter which he had written to Mary Cope, and if he found such a letter, to take it out. The witness did as directed, and found the letter in question. The prisoner's counsel objected to the reading of this letter, but the court overruled the objection, and defendant's counsel excepted. (The letter was not sent up in the bill of exceptions.)

On the trial of the cause the witness G. L. Gibson was asked by the prisoner's counsel if he had not gone to the witness Mary Cope and offered her money, which had been furnished by the prisoner, to go away and not testify in the cause. This evidence was objected to by the State's counsel, and the court rejected it. Defendant's counsel excepted.

On the trial of the cause, when the jurors were directed to be called, the prisoner's counsel objected to the whole venire, which had been summoned by an order of the court made on the day before. The objection was on the ground that it did not appear that the said jurors had been ordered by the court to be summoned in this particular case, but that it appeared from the minutes of the court that the order was made in the case of the State against McGrady. The court overruled the challenge, and defendant's counsel excepted.

After carefully recapitulating the evidence, the court charged the jury:

"1. If the jury believe that the prisoner went to the house of McGrady, at the time spoken of, for the purpose of carrying on an illicit intercourse with the wife of the deceased, and carried his rifle with him for the purpose of using it against the deceased if a difficulty or encounter should arise between them, and he then took the life of the deceased by the infliction of the violent blows on the head and cutting of his throat, as the evidence indicated, then it was a case of murder.

"2. If the jury believe that the prisoner went to the house of (134) McGrady with no unlawful purpose, and, getting there, he was involved in a fight with the deceased, without provocation on his part, and the deceased wrested the gun from him and fired it at him, and then at the spot where the fight commenced, the prisoner inflicted the blows with the rifle, and cut the throat of the deceased in the heat of blood, then it was only a case of manslaughter.

"3. If the jury believed that the deceased was struck down by the prisoner, by blows with a rifle, as testified to by Dr. Beatty, and as indicated by the prisoner's confession, and yet, life being not extinguished by the blows, the prisoner took the deceased and moved him to the smokehouse, and there, finding him still alive, took a knife from the crack of the smokehouse and cut the throat of the deceased, and that extinguished his life, it was a case of murder, and was such a killing as was charged in the bill of indictment.

"4. That the jury must be satisfied that the killing was in the manner and form as charged in the bill, and if they believe that the deceased died from wounds inflicted with the rifle, the jury ought to acquit."

The prisoner's counsel asked the court to charge the jury that, supposing the prisoner went to the house of McGrady, and took the gun with him only for the purpose of defending himself, and that the fight occurred and the throat was cut at the place where the fight commenced, then it was a case of manslaughter only. The court declined giving the instruction, and defendant excepted.

Prisoner's counsel further moved the court to charge the jury that if they believed the fight was as the female witness (Mrs. Cope) described it, and that the deceased got the gun and the prisoner drew his knife to defend himself from the attack of the deceased, and then cut his throat to prevent deceased from killing him, then it was a case of justifiable homicide. The court declined to give this instruction, and defendant again excepted. (135)

The defendant was found guilty of murder. Upon which, judgment of death was pronounced, from which the defendant appealed to the Supreme Court.

Attorney-General for the State.
No counsel appeared for prisoner in this Court.

BATTLE, J. We have examined with care the various objections set out by the prisoner in his bill of exceptions, and are prepared to state the conclusions to which we have been led.

1. The challenge to the array of jurors made by the prisoner has nothing to sustain it. Such a challenge is an exception to the whole panel, and is generally founded on a charge of partiality, or some default of the sheriff or other officer who summoned them. 3 Bl. Com., 359; 4 *ibid.*, 452. In the present case the jurors excepted to were summoned on a special *venire facias* issued by an order of the Court and executed by the sheriff. No exception is taken to the officer nor to the manner in which he discharged his duty; the objection is founded on the allegation that the order was not made in the case of the prisoner. But we can see no necessity that the record should show in what particular case the court made the order. It is sufficient if it appear that it was made at the term at which the trial was had. When summoned, the jurors may be called in any case in which a person may be tried at the term for a capital offense. Rev. Code, ch. 35, sec. 30.

2. The objection to the introduction as evidence of the letter written by the prisoner to Mary Cope is, we suppose, abandoned, as no copy of the letter has been sent up, though stated to be annexed to the bill of exceptions as a part of it.

3. The purpose for which the prisoner's counsel proposed to ask the witness G. L. Gibson if he had not gone to the witness Mary Cope and offered her money, furnished by the prisoner, to go away, is not
(136) stated. We are unable to perceive how the exclusion of it by the court could have prejudiced the cause of the prisoner.

4. The charge of the court to the jury as to the law applicable to the different views which they might take of the testimony was certainly as favorable to the prisoner as he had a right to claim. Whether upon the point in relation to the manner of the killing it was not more so may, perhaps, admit of doubt. It is true that if a man be indicted for one species of killing, as if by poison, he cannot be convicted by proving a totally different species of death, as by shooting, starving, or strangling; but if the means of the death proved agree in substance with those charged, it is sufficient. Thus, where the death is caused by any weapon, the nature and description of the weapon ought to be stated; yet if it appear that the party was killed by a different weapon, it maintains the indictment; as if a wound or bruise be alleged to be given with a sword, and it proves to be with a staff or axe, the difference is immaterial. See

Ros. Crim. Ev., 706; 1 East Pl. Cr., 341; 2 Hale Pl. Cr., 185. It is unnecessary to pursue the inquiry, because the error, if there were one, was in favor of the prisoner, and he cannot object to it.

5. The special instructions asked for by the prisoner's counsel were upon a hypothetical state of facts not presented by the evidence, and his Honor was, therefore, not bound to give them.

We have examined the whole record, and have found therein

PER CURIAM. No error.

Cited: S. v. Hensley, 94 N. C., 1028; *Boyer v. Teague,* 106 N. C., 620; *S. v. Moore,* 120 N. C., 571.

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(137)

STATE v. STEPHEN BAILEY.

Where there is a conflict of testimony, which leaves a case in doubt before a jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead, this Court will order a *venire de novo.*

INDICTMENT for trading with a slave, tried before *Osborne, J.,* at Fall Term, 1862, of DAVIDSON.

The indictment was for trading with Miles, a slave, belonging to one Robert B. Jones, for a piece of bacon. The prosecutor, Jones, swore that on a certain night of one of the first days of March (he could not tell which) he found his negro boy, Miles, near his smokehouse with some pieces of bacon in a bag, which the negro had taken from the smokehouse; that he demanded of the negro whither he intended to take it, and threatened to whip him severely unless he disclosed, whereupon the slave stated that he intended carrying it to the defendant, who was to start to Cheraw the next day, and had persuaded him to bring the bacon that night. (The conversation of the slave with the master was received by the consent of the defendant's counsel); that he then told the slave to carry it to the defendant, as he had intended, and he went with him to near the house of the defendant; that the negro placed the meat on a stump and went to the door of the house and quietly knocked and whistled, when the defendant came out and agreed to give the negro $1.50 for the meat; that defendant stated that he had no smaller sum than $5 and could not make the change, but would pay him soon; that he took the meat up and carried it into the house, and then the witness and the

negro left. On cross-examination, he stated that he allowed the negro to carry four pieces, when one would have answered, because he feared the suspicions of the defendant would be excited if he had carried but a small piece of meat. He further stated, without objection on the part of defendant's counsel, that he detected the defendant once before trading with a slave which belonged to his mother, and did not prosecute, because his mother did not wish a fuss in the neighborhood.

(138) The defendant introduced one Bailey, his brother, who stated that on the last day of February he started with his brother to Cheraw; that on the first day they went out of the county of Davidson; that they were absent six days, when they returned to the house of the defendant on the night of 7 March; he was not certain, but thought that they returned about 12 o'clock at night; that defendant and his wife slept in one room of the house and he in another; that the door was open and he could see or hear whatever occurred in his brother's room, and did not believe that the circumstances narrated by the witness Jones could have occurred without his knowledge. He further stated that on the next day defendant and witness went to a sale in the neighborhood and did not return until very late; that he slept that night in the same room; that on the 8th he and his brother went to the house of one Hopkins and remained until after 12 o'clock, when they returned and slept in the manner previously described; that on the 9th he and his brother went to Wadesboro as witnesses, and did not return until the 12th of the month.

Two witnesses by the name of Hunt stated they were present when a general quarrel grew up between the witness Jones and one Reeves; that there was a great deal said on both sides which they did not hear or remember, but they were under the impression that, in the course of the quarrel, Jones said he knew nothing about the trading except what the negro told him. On cross-examination one of the witnesses stated that he could not assert, positively, that this was the language of the prosecutor, but it was his best impression.

One Hopkins testified that some time in August the prosecutor came to his field where he was at work and asked him what Reeves and Bailey, the defendant, said about his going to the house of the defendant in June, and said he had not stated at that time that Bailey got any meat from his negro, but all he knew about it his negro told him; but that on the last days of March he had detected his negro stealing meat

(139) from his smokehouse; that he didn't make known to the negro that he had found it out, but followed him secretly until he saw him place the meat on a stump near the door of defendant's house; that the negro went to the door and knocked and whistled, when the defendant came out and agreed to give the negro $1.50 for the meat, but he said

he had no bill smaller than $5; that he would pay him as soon as he could get the change. This witness also stated that in the same conversation the prosecutor said he would not have prosecuted the defendant if he had paid the negro for the meat and had not brought suit against him.

Several witnesses testified that the character of the prosecutor was bad, and several others testified that it was good.

The court charged the jury that if they believed the witness Jones, they ought to find the defendant guilty; but it was argued that the prosecutor should not be believed, because of contradictions to his testimony which had been proved, and because of his bad character; that as to the contradictions alleged to be derived from the witness Bailey, they would inquire whether there was any fact proved inconsistent with the testimony of the prosecutor; if they believed the trading took place before the journey to Cheraw, there was no contradiction; if it took place afterwards, whether there was a contradiction or not depended on whether there was an opportunity for the occurrence spoken of by the prosecutor to have taken place without the knowledge of the witness Bailey; that it was the duty of the jury to reconcile testimony, if possible; that on questions of time, depending upon the memory of witnesses, they would consider whether there might not be errors of recollection as to days, weeks, or hours of the night when certain occurrences took place.

As to the contradictions alleged to be proven by the witness Hunt, the court charged the jury that contradictions are more or less strengthened by the recollection of the witness, by his opportunity of hearing all the antecedents and succeeding parts of the conversation; the context might explain the language of the witness and relieve what other- (140) wise might be an apparent contradiction.

As to the contradiction deposed by the witness Hopkins, it was to be taken, as a whole, inconsistent with the statements of the prosecutor as to the manner of the negro's getting the meat and his taking it to the house of the defendant; that these matters were not material to the question of the defendant's guilt, which depended on what they might think as to whether he purchased the meat from the slave after he arrived at the house; that the contradictions of the prosecutor were immaterial matters, and, if they believed them, might go to his credit; they would also consider the testimony so far as it confirmed the State's witness in matters on which the guilt of the defendant depended, and give to each such force as they believed it entitled to; that as to the character of the prosecutor, they would consider the testimony both for and against it, always weighing it with care and scrutiny. The defendant's counsel excepted to the charge.

Verdict for the State and judgment of the court. Appeal by the defendant.

Attorney-General for the State.
No counsel for defendant.

PEARSON, C. J. The evidence in this case leaves the matter so nearly on a balance as to require very great consideration on the part of the jury in order to determine on which side the truth preponderates. When that is the case, it is of the utmost importance that the words used by the judge in giving his charge should be precise and accurate and not susceptible of a meaning which would be calculated to mislead the jury. His Honor puts the case on the credit of the prosecutor, Jones, and instructs the jury that it was *their duty* to reconcile the testimony, if *possible,* and then suggests that a "collision" between the witnesses Jones and Bailey, the witness for the defendant, might be avoided on the supposition that Jones was mistaken as to the date of the supposed
(141) trading with the slave. It is a rule of law, based on the principle that no witness, either on the side of the prosecutor or the defense, shall be presumed to have committed perjury; that the witnesses should not be put in collision, and a perjury on the one side or the other made inevitable, if the collision can be avoided by any other fair and reasonable view of the case as presented by the whole of the evidence. We presume his Honor intended so to be understood; but his words are much stronger, and were calculated to mislead.

His Honor also instructs the jury that in regard to the alleged contradiction of the witness Jones, in that he had said in conversation before the trial that all he knew of the negro's having taken the meat and trading it to the defendant was from what the negro had told him, whereas, on his oath, he stated that he had detected the negro in *the very act of taking the meat,* and had gone with him, and was present when the defendant committed *the very act of trading* with the slave, so that he had caught the defendant in the act, that this contradiction of the witness Jones was an *immaterial matter,* and *went to his credit,* if the jury believed it. There had been no objection to the competency of the witness Jones, so that we do not clearly understand what his Honor means by the words "went to his credit," in the connection in which they were used. Of course, this contradiction went to his credit, for it bore on *the very fact,* and ought to have had a very decided weight with the jury, if they believed it, in estimating the credit to which the testimony of the witness Jones was entitled. There is

PER CURIAM. Error.

Cited: S. v. Rogers, 93 N. C., 532; *Withers v. Lane,* 144 N. C., 190; *Speed v. Perry,* 167 N. C., 127.

(142)

STATE v. JOHN TWIGGS.

1. It was held to be error in a court, in the trial of a criminal case, to order that an affidavit, made by the defendant, for the continuance of the cause should be read as evidence for the affiant, with leave for the State to offer testimony in contradiction (the defendant objecting and insisting on a continuance).

2. Upon the conviction of a prisoner in a capital case, the sentence of the court must be carried into execution by the sheriff of the county where he was tried, and it was *held* error to order it to be done in the county whence the cause was removed, or by the sheriff of that county.

INDICTMENT for murder, tried before *Saunders, J.,* at Fall Term, 1862, of RUTHERFORD.

The cause had been removed, on the affidavit, from Burke. The defendant offered an affidavit stating certain facts as the ground for a continuance of the cause, on which the court decided "that the cause should be continued unless the solicitor for the State would consent to have the affidavit read as evidence, and he should be at liberty to offer testimony in contradiction. The defendant excepted to this ruling. The solicitor accepted the terms, the trial was had, the affidavit was read in behalf of the prisoner, and the State produced evidence controverting the facts stated in the affidavit. There was a verdict against the prisoner for murder. The court adjudged that the defendant be taken to the county of Burke, from whence he came, and kept in close confinement until Friday, 2 January, 1863, when he be taken to the place of public execution, and then be hanged by the neck until he be dead, and the sheriff of Burke is to carry this sentence into effect."

Attorney-General for the State.
No counsel for defendant.

PEARSON, C. J. In all criminal prosecutions every man has a right to be informed of the accusation against him, and to *confront the accusers and witnesses with their testimony,* and shall not be compelled to give evidence against himself. Declaration of Rights, (143) sec. 7.

By the common law the witnesses must be examined in the presence of a jury, so as to enable the jury the better to pass on their credit by observing their looks, manner, etc.

In the trial of civil cases this rule of the common law is departed from, under certain circumstances, and depositions are allowed to be read where the attendance of the witnesses cannot be procured. But in criminal cases depositions are never read, either for or against the

prisoner, and the common-law mode of trial is strictly adhered to. Where an affidavit is offered for the continuance of a cause and is considered sufficient, the cause will be continued, unless the opposite party *will admit the facts set out in the affidavit to be true,* for, if the statement of the witness is to be controverted, the party offering the testimony has a right to have the witness examined in the presence of the jury. This practice has never been departed from, so far as we are informed, until the present case, and we can see no principle upon which, in the trial of a capital case, this departure from the well-settled mode of trial can be allowed; indeed, it violates the clause in the Bill of Rights which secures to every man the right to confront the accuser and witnesses with other testimony.

Another departure from a well-settled practice appears in the record in this case, which the Court feels it to be a duty to correct. The judgment is, "that the prisoner be taken to the county of Burke, from whence he came, and kept in close confinement until Friday, 2 January, 1863, when he will be taken to the place of execution," etc., and "the sheriff of Burke County is to carry this sentence into effect," etc.; "ordered that the sheriff of this county (Rutherford) safely deliver the prisoner to the sheriff of Burke County, to be kept in the jail of Burke County," etc.

When the cause was removed to Rutherford County for trial, the prisoner was in possession of the *court there,* and the sheriff of
(144) Rutherford then had charge of him; neither the court nor the sheriff of Burke had any further concern with the cause of the prisoner, and we can see no ground on which, after conviction, the judge could order the sheriff of Burke to carry the sentence into effect. The fact that the prosecution had originated in the county of Burke, after the removal to Rutherford, gave the judge no more power to give the power to the sheriff of Burke than to the sheriff of any other county. The sheriff of Rutherford then had the prisoner in his charge, and was to execute the sentence of the law.

PER CURIAM. Error.

Cited: S. v. Cunningham, 72 N. C., 478.

STATE v. WILLIAM B. GARRETT ET AL.

1. Where a defendant in a State's warrant charging a misdemeanor put himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take defendant, slew him, without resorting to unnecessary violence, it was *held* that he was justified.

2. The principle of *self-defense* does not apply to the cause of one who puts himself in the posture of armed defiance to the process of the State.

3. One to whom a State's warrant is specially directed is bound to show it, and read it, if required; but where the defendant in such warrant had notice of the process, and was fully aware of its contents, and had made up his mind, beforehand, to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant on demand.

INDICTMENT for murder, tried before *Saunders, J.,* at Fall Term, 1862, of BUNCOMBE.

The defendant William B. Garrett and the other defendants, ten in number, were put upon their trial for the murder of Uriah C. Burns.

Verdict of guilty of murder as to W. B. Garrett, John Morris, Sr., and R. L. Birchfield, and judgment of death pronounced against them; and verdicts of guilty of manslaughter were rendered against six others, who were sentenced to imprisonment for six months, but were permitted to escape imprisonment by entering into the army. Two of the defendants, J. H. C. Morris and J. M. Morris, were acquitted. W. B. Garrett, John Morris, Sr., and Robert L. Birchfield appealed to this Court.

Attorney-General for the State.
No counsel for defendants.

PEARSON, C. J. His Honor charged: "The warrants in this case, being for a misdemeanor, and not for felony, gave the prisoner Garrett no authority, or any of his numerous guard of eighteen men, all armed, to take away life by the use of a deadly weapon, in order to execute his warrants." We do not concur in the proposition of law (149) which his Honor here lays down; on the contrary, after mature reflection, we are satisfied, not only that it is erroneous, but would make the due administration of the law impracticable.

These facts are not controverted: State's warrants and peace warrants had been duly issued against the deceased and his wife and son and daughter, for an assault and battery on Adeline Burns; for the want of a regular officer, the sheriff duly deputed the prisoner, Garrett, to execute the warrants and arrest the defendants; Garrett goes to the deceased and notifies him that he has the warrants, whereupon the deceased, having his gun, refuses to submit, but says he would let the

sheriff or coroner serve the warrants. Garrett thereupon retires, and on the next day, having summoned eighteen men, they all go, armed with guns, to the premises of the deceased and arrest the son, whereupon the deceased, his wife and daughter, he armed with his gun, and they with an axe and knife, sally out from the house and meet the party in the lane; guns are several times pointed on both sides; the deceased starts to cross the fence and is shot by one of the guard.

His Honor ought to have instructed the jury that, as the deceased had put himself in resistance to the officer and his guard, they were not only authorized, but were bound to use such a degree of force as was necessary in order to execute the warrants, and were entitled to a verdict of acquittal on the ground that the homicide was justifiable, if no unnecessary violence had been used, unless from the fact that the prisoner had started to cross the fence the jury should be satisfied that he had abandoned his deadly purpose of resisting to the death the execution of the law, and was attempting to make his escape by moving off; in which event there was no longer any necessity for shooting, and the officer, or some portion of his men, should have run after him and captured him in that way, and in passing on this question it was for the jury to determine whether the intention of the deceased in attempting to

(150) cross the fence was to make an attack on Birchfield or to rescue his son, or run away; and in the latter case, if he still retained his purpose of resisting to the death, and to make a *running fight,* the officer and his men were not bound to risk their lives by rushing on a desperate man who still kept his gun in his hands.

This conclusion is so fully sustained by the necessity of "preserving good order and asserting the supremacy of the law" as to make it unnecessary to cite cases. In the execution of a State's warrant for treason, felony, or a *breach of the peace,* the sacredness of the Lord's day is to be disregarded; the dwelling-house (or castle, as it is termed in the books) must be broken into, and everything done which is necessary in order to execute the warrant. In other words, resistance to the execution of the command of the State is not allowed. The warrant must be executed *peaceably, if you can; forcibly, if you must.*

There are other points to which we will not refer, because, from the manner in which the case is made up, we are not satisfied that we clearly apprehend them. It is proper, however, to say that we can see no evidence, by a perusal of the record, to justify this charge: "The deceased, whilst he had a right to defend himself, had no right to use a deadly weapon, *unless in self-defense of his life.*" When a man puts himself in a state of resistance, and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and to set up the excuse of self-defense. Again, one who

is not a known officer ought to show his warrant, and read it, if required; but it would seem that this duty is not so imperative as that a neglect of it will make him a trespasser *ab initio,* where there is proof that the party subject to be arrested had notice of the warrant and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. There is

PER CURIAM. Error.

Cited: S. v. Belk, 76 N. C., 12; *S. v. Dula,* 100 N. C., 427; *S. v. Armistead,* 106 N. C., 644; *S. v. Lingerfelt,* 109 N. C., 780; *S. v. Stancill,* 128 N. C., 610; *S. v. Horner,* 139 N. C., 611; *S. v. Durham,* 141 N. C., 744, 757; *S. v. McClure,* 166 N. C., 330; *S. v. Beal,* 170 N. C., 767.

(151)

STATE v. ROBERT W. JOHNSON.

Where a defendant in a criminal prosecution offered, in defense, proof of the character he sustained at the time of the alleged offense, it was *held* to be error to permit evidence to be given of his character at a subsequent period.

LARCENY, tried before *Howard, J.,* at Fall Term, 1861, of BLADEN.

The defendant introduced witnesses to prove his general character. The defendant's counsel asked them as to his general character at the time the offense was supposed to have been committed. The solicitor then asked them what his character was then (at the time of the trial). The defendant's counsel objected to the question, but it was allowed by the court. Defendant excepted.

Verdict for the State, judgment, and appeal by defendant.

Attorney-General for the State.
Shepherd for defendant.

BATTLE, J. It is a rule of evidence that the defendant in an indictment for a criminal offense may offer testimony of his general character as evidence from which, if good, a presumption in favor of his innocence may be inferred. Formerly, it was thought that this evidence could not be of any avail unless the case were a doubtful one; but it is now settled that the testimony establishing a good character must be considered by the jury in every case, they giving to it whatever weight they may consider it entitled to under the circumstances. *S. v. Henry,* 50 N. C., 65. Whenever such testimony is given, the prosecuting officer may rebut it, if he can, by introducing testimony to show that the defendant's charac-

ter is bad. The question is now presented, for the first time, in this State, To what time shall the prosecutor's evidence refer—to the time of the alleged commission of the offense, or to that of the trial? The (152) authorities referred to by the counsel seem to leave this question somewhat unsettled in the courts of England and of the States where it has occurred. We think that, upon principle, it ought to be confined to the time when the charge was first made. A different rule will expose the defendant to the great danger of having his character ruined or badly damaged by the arts of a popular or artful prosecutor, stimulated to activity by the hope of thus making his prosecution successful. Evidence of character is of the nature of hearsay, and the general rule in relation to that kind of testimony is that it shall not be received if the hearsay be *post litem motam.* See *Dancy v. Sugg,* 19 N. C., 515; 1 Phil. Ev., ch. 7, sec. 7, p. 192. The reason for this is "that no man is presumed to be indifferent in regard to matters in actual controversy; for when the contest has begun, people, generally, take part on the one side or the other—their minds are in a ferment, and if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected." 1 Green. Ev., sec. 131. These remarks apply with equal force to evidence of the character of a person after a controversy, involving it, has commenced. Such evidence ought, therefore, to be rejected.

PER CURIAM. New trial.

Cited: S. v. Laxton, 76 N. C., 218; *S. v. Patterson,* 78 N. C., 473; *S. v. Brittain,* 117 N. C., 783; *S. v. Spurling,* 118 N. C., 1251; *S. v. Connor,* 142 N. C., 705; *S. v. Holly,* 155 N. C., 494; *S. v. Morse,* 171 N. C., 778.

APPENDIX

IN THE MATTER OF J. G. MARTIN.

The acceptance of the office of brigadier general under the Confederate States vacated the office of adjutant general of North Carolina.

EXECUTIVE DEPARTMENT, N. C.
RALEIGH, N. C., 2 March, 1863.

HON. R. M. PEARSON, *Chief Justice of North Carolina:*

DEAR SIR:—You are aware that the Legislature, by a joint resolution, declared the office of adjutant general vacant by reason of the incumbent's having accepted an incompatible office under the Confederate States Government, and that by a subsequent act the appointment was conferred upon the Governor.

General Martin, the present incumbent, having declared his intention of testing the legality of this action of the Legislature by an appeal to the courts, I am placed in a position rather embarrassing. To avoid the somewhat unpleasant spectacle of a lawsuit for the possession of an office, confidential in its relation to myself, and very important to the public at this time, I have concluded, with the consent of General Martin, to make a case and ask the opinion of the Supreme Court immediately thereon.

With this view I should be greatly obliged, and I have no doubt the public interest would also be subserved, if you would have the kindness to call the Court together and give its opinion upon the question. As early a day as possible is respectfully requested.

Very respectfully, your obedient servant,

Z. B. VANCE.

CASE AGREED.

At the recent session of the General Assembly the Legislature having resolved "that by reason of the acceptance by Gen. James G. Martin, adjutant general of North Carolina, of the office of brigadier general of the army of the Confederate States, the said office of adjutant general was surrendered and is declared to be vacant," and having (154) enacted, also, that the power of appointing to said office should be vested in the Governor; and his Excellency, Governor Vance, having indicated to General Martin his purpose to proceed to make an appointment thereto, it was insisted by General Martin that the office was filled, and he was the proper and lawful incumbent thereof, notwithstanding

the resolution aforesaid, by virtue of his election to said office by the preceding Legislature, under the act of the General Assembly, entitled "Militia," chapter 17, ratified on 20 September, 1861. Whereupon it was agreed by the Governor and General Martin to request the judges of the Supreme Court to give their opinions upon the question whether the office was vacant and the Governor might lawfully proceed to appoint thereto.

The question upon which the opinions of the judges are sought arises out of the following agreed facts:

In September, 1861, Gen. James G. Martin was duly elected by the Legislature adjutant general of the State of North Carolina, in pursuance of a statute on the subject of the State militia, ratified 20 September, 1861, accepted the office, was qualified, and entered upon the duties thereof, and has continued since to exercise the powers and perform the duties of the same.

General Martin held the rank of captain and brevet major in the army of the United States, tendered his resignation at Fort Riley, Kansas, 1 June, 1861, and by the provisions of the law of the Confederate States he became entitled to similar rank in the regular army of the Confederate States, and received and accepted the appointment therein of a captain of artillery, and at the request of the Governor of North Carolina was ordered to report to him for duty.

In May, 1862, General Martin accepted the office of brigadier general in the provisional army of the Confederate States, under the following circumstances: The appointment had been some days tendered, but not accepted, when Governor Clark received a telegram from the President, urging him to send General Martin with four regiments, then in camp near the city of Raleigh, and which had not then been mustered into the Confederate service, to Weldon.

(155) General Martin then had an interview with the Governor, and it was concluded between them that he should accept the appointment of brigadier general, in order to comply with the request of the President, but with the understanding that it was not to vacate his office of adjutant general.

In a day or two afterwards, and before the regiments moved, General Martin was ordered by General Holmes, commanding in this department, to repair with these regiments to Kinston, which he did.

He remained there some six weeks, and while there had also authority from the Governor, in his capacity of adjutant, to call out, for active service, the militia in the adjacent counties.

While the battles near Richmond were being fought, Governor Clark telegraphed the President that he thought General Martin and his brigade could be spared from the State, if he deemed it important to have

them; and in consequence, General Martin receiving an order from General Holmes, then below Richmond, repaired with his brigade to Drury's Bluff, on James River. The battle was over before he reached that point.

A few days after reaching Drury's Bluff, General Martin tendered his resignation as brigadier general for the purpose of returning to North Carolina to resume the discharge of the duties of adjutant general, in person. About ten days afterwards he was notified of the acceptance of his resignation. While at Drury's Bluff, by the request of Governor Clark, he also transacted business as adjutant general of the State, with the Confederate authorities in Richmond.

Upon the interposition of General Lee, and with the approbation of Governor Clark, and consent of General Martin, the resignation of General Martin and the acceptance thereof were annulled, and he was reinstated in the office of brigadier general, but has never received any pay either as brigadier general in the provisional army or captain in the regular army, and has since remained in the city of Raleigh in the discharge of the duties of Adjutant General, except when absent by the orders or assent of the Governor of the State.

B. F. Moore, Esq., for the Attorney-General. (156)
Thomas Bragg for General Martin.

OPINION OF THE JUDGES IN THE MATTER OF THE ADJUTANT GENERALSHIP.

At the request of his Excellency, Governor Vance, and of General Martin, the judges of the Supreme Court have heard a full argument on the questions of law presented by the facts set out in "the case agreed," and certify their opinion to be that the office of brigadier general under the Confederate States is incompatible with the office of adjutant general under the State of North Carolina; and that, on the facts stated, "the office of adjutant general is vacant, and the Governor may lawfully proceed to appoint thereto."

It is proper to state that in giving this opinion we do not act as a Court, but merely as judges of the Court, and have treated the matter in the same light and with the same full consideration as if the case had been regularly before the Court upon a proceeding appropriate to present the question.

We were induced to take this action, and felt not only at liberty to do so, but conceived it was in some measure our duty thus to aid a coördinate department of the Government, because we were informed by his Excellency, the Governor, that the subject would in that way be relieved from all further embarrassment, and that the public interest required that it should be adjusted sooner than it could be done by the regular

mode of proceeding in court, particularly as the Court now holds but one term during the year. *Berry v. Waddell,* 31 N. C., 516, Appendix.

R. M. PEARSON, C. J., S. C.
WILL H. BATTLE, J., S. C.
RALEIGH, 11 March, 1863. M. E. MANLY, J., S. C.

Cited: McNeill v. Somers, 96 N. C., 473; *Barnhill v. Thompson,* 122 N. C., 497.

(165)

IN RE HUIE—HABEAS CORPUS.

The facts are: Huie is 29 years of age; is now, and has been since the death of his father, in 1857, the overseer of his mother, who is a widow, and lives on and owns a plantation in Cabarrus County, and has during that time owned and kept on her plantation more than twenty negroes. She is upwards of 60 years of age, and no white person lives on the place except herself and a daughter about 19 years of age. Huie owns and lives on a place adjoining; has a wife and two small children; no other white person on the place. The witness did not know whether Huie receives wages as an overseer, but if he does not, he knows that he earns wages, for ever since the death of his father he has managed his own negroes (some thirteen or fourteen) and has acted as the overseer of his mother, and attended to her business generally; has been diligent; managed the negroes well; kept them in good order, and made good crops. The affidavits required by the act are filed. Huie has for several years been afflicted with bronchitis and was not enrolled and ordered into service when the other conscripts left the county, but on 11 October, 1862, reported at the camp of instruction near Raleigh, when Dr. Baker certified as follows:

HEADQUARTERS, CAMP OF INSTRUCTION,
CAMP HOLMES, 11 October, 1862.

I certify, on honor, that I have carefully examined Henry C. Huie (Colonel Barnhardt, 84 N. C. Militia) and find him incompetent to perform the duties of a soldier, because of bronchitis. He is excused until 1 May, 1863. R. B. BAKER, *Surgeon, P. C. S. A.*

Approved:
J. C. MCRAE, *Captain & A. A. G., P. C. S. A.*

Huie's name was put on the roll at that date, and returned home and remained there until his arrest.

The construction of the conscription and exemption act, like other acts of Congress, so far as they concern the rights of a citizen, as distinguished from military regulations and rules which the Secretary of War is authorized to prescribe in order to carry the acts into effect (for instance, the manner of having persons examined in order to determine whether they are fit for military service in the field) is matter for the courts, and any construction put on the acts by the officers (166) of the executive department, as to who is liable as a conscript or who is entitled to exemption, is subject to the decision of the judiciary. This principle of constitutional law is so clear that I suppose it will be conceded by every one.

In re Mills, a shoemaker, *Angel,* a wagonmaker, and *Nicholson,* a miller, I decide that the exemption act applies to the conscription act of April as well as to the conscription act of September, and no discrimination is made between mechanics under or over the age of 35. For the same reason I am of opinion that the exemption act of May, which is an amendment of the act of October, applies to both conscription acts.

I do not consider it necessary, for the purposes of this case, to decide the point made by Mr. Boyden, that it is the intention by the act of May to take out of the army and restore to their occupations the overseers of *feme soles,* infants, and lunatics, provided the persons were employed and acting as overseers previous to 16 April, 1862, and provided there is no white male adult on the farm who is not liable to military duty, and provided affidavit is made that after diligent effort no overseer can be procured for the farm who is not liable to military duty, and provided $500 shall be annually paid into the public treasury by the owner of the farm or plantation. For I am of opinion that supposing the act not to embrace persons who are in service, the petitioner's case fulfills all of the conditions and requirements of the act. He is now, was previous to 15 April, 1862, and has been all the time since 1857 the overseer of a *feme sole,* etc.

It is insisted on the part of Colonel Mallett that the petitioner was enrolled 11 October, 1862, and has been from that date constructively in the service of the Confederate States, and consequently cannot during that time be considered as having been an overseer.

This position depends on what amounts to an enrollment, and its legal effect. If an enrollment amounts to no more than writing a man's name on a list with others, that was certainly done on 11 October, 1862; but, if it is to have the legal effect of putting a man in the actual or constructive service of the Confederate States, then I am of opinion that what was done on that day was not valid as an en- (167)

rollment; for the reason that Huie, by force of Dr. Baker's certificate, was excluded from the operation of the conscription act, and was exempted, being ascertained under the rules prescribed by the Secretary of War *"to be unfit for military service in the field"*; so the commandant of conscripts had no right to have his name put on the roll *as a conscript*, and instead of doing so, and excusing him until 1 May, 1863, according to the rights of Huie, he should have been sent home, and the proper time for enrolling him would be after he recovered and became fit for military service in the field (if he happened to recover), to be determined under the rules prescribed by the Secretary of War; for the law exempts all persons who shall be held unfit for *military* service in the field by reason of bodily infirmily, etc., under rules to be prescribed by the Secretary of War, and Dr. Baker, acting under these rules, certified that he is incompetent to perform the duties of a soldier. In other words, he is "unfit for *military* service in the field." So that he was *ipso facto* exempted for the time being. In reply to this, it is said the Secretary of War, by the Adjutant General, had prescribed a rule that persons unfit for military service in the field shall be enrolled and may be put to service in the hospital, quartermaster, or on medical staff. So the question is, Had the Secretary of War authority to have men unfit for *military* service in the field enrolled as conscripts, on the ground that they might be of some service in hospitals, or on the quartermaster's or medical staff? The act exempts all persons held to be unfit for "military service in the field," and clearly no rule prescribed by the Secretary of War could defeat this express provision; for instance, no rule of his could make a man with one arm, who is certified by the surgeon to be unfit for military service in the field, liable as a conscript, although he might answer some purpose about a hospital or be of some service to the quartermaster; because, whether a man is entitled to exemption or not depends on the construction of the act, which it is the privilege of the courts to make, and the authority of the Secretary of War is simply to prescribe rules and make regulations in order to have the fact
(168) determined whether a man is or is not fit for military service in the field; for which purpose *alone*, the representatives of the people in Congress assembled, to whose wisdom is confided the trust of making laws, had declared it necessary to take citizens from their homes against their consent. Thus far conscription is carried by our lawmakers, and no further. I was informed by Adjutant Pierce, who returned the body for Colonel Mallet, that this rule had been revoked; but he insists that acts done under it before it was revoked are valid. I do not concur in this position, for the reason stated above, and consider what is called an enrollment on 11 October, 1862, as void and of no legal effect. So the petitioner, according to my view of the case, was

employed and acting as the overseer of a *feme sole* owning, etc., etc., at the time of his arrest, at the passage of the act, on 11 October, 1862, on 16 April, 1862, and for several years previous thereto, and is entitled to exemption. R. M. PEARSON, C. J., S. C.

20 May, 1863.

IN RE AUSTIN—HABEAS CORPUS.

THE writ in this case was returned before me at Richmond Hill. As it presented a new question, I desired to have the aid of *Judge Battle* and *Judge Manly* at the hearing, and also the benefit of argument by counsel, for which purpose it was adjourned to this place. I regret that I have been disappointed. It becomes my duty to decide the case without the presence of the other judges, and without argument, except by Mr. Furches and Mr. Winston in behalf of the petitioner; so that I am really not apprised of the ground on which the Governor rests his claim of authority.

The petitioner is exempted as a conscript by reason of a substitute, and is exempted from duty as a militiaman by force of the first section of the act of the last session of the Legislature entitled "An act in relation to the militia and a guard for home defense." Major Harbin sets out in his return to the writ that he had the petitioner (169) arrested under an order of the adjutant general for the purpose of arresting conscripts and deserters, "as said Austin was a member of the Home Guard and liable to perform said duty." The order is in these words:

RALEIGH, 15 September, 1863.

Major A. A. Harbin will immediately call out the Home Guard of Davie County, and arrest every deserter or recusant conscript within said county, and deliver them to Colonel Mallett at Camp Holmes. If it be necessary, you can pursue said deserters beyond the limits of your county. Those citizens who aid, harbor, or maintain deserters will be arrested and bound over to the courts to answer said charges. You will report to this office the manner in which this order has been executed.

By order of Governor Vance. J. H. FOOTE, *A. A. Gen.*

The question presented by the petition and return is of great importance. On the one hand, if the Governor is authorized to require the Home Guard to perform the service of arresting deserters and conscripts, it will promote the efficiency of the Confederate Army; on the other

hand, it will impose on citizens who, by the acts of Congress and the Legislature, are exempted from conscription and militia duty, a dangerous and irksome labor.

The subject must be considered by a judge "as a dry question of law," unaffected by collateral considerations growing out of the condition of our country; and for this reason his conclusion may differ from that of those who are at liberty to look at it under the bias of feeling.

It is a part of the duty of a soldier of the Confederate Army to arrest deserters and recusant conscripts. The Governor of a State has certainly no authority to require a citizen, unconnected with any military organization, to perform this part of the duty of a Confederate soldier. Whether the Governor had authority to require a citizen belonging to the militia to perform this duty is a question which has not been decided. It may be conceded that the Legislature has power to give this authority to the Governor in respect to the militia, on the ground that they
(170) were liable to be called into the service of the Confederate States, and might be required to do a part of the duty as a compensation for not being called into service and required to do the whole duty of a Confederate soldier. But it is a question worthy of great consideration whether the Legislature has power to authorize the Governor to require this duty of citizens who do not belong to the militia, which is the only military organization, except enlisted soldiers, recognized by the Constitution. It is not necessary for the purpose of this case to decide the queston and it is referred to only for the sake of applying the rule, "where a power has never been before exercised and is doubtful, the courts will not presume that it was the intention of the Legislature to assume it, but will require a clear expression of an intention to do so."

The matter then stands thus: The Governor has no authority to require a citizen, who does not belong to the militia, to perform this part of the duty of a Confederate soldier. Has the Legislature conferred the authority upon him? It is insisted that this is done by the act of the last session, entitled "An act in relation to the militia and for home defense," which act, and the act "to punish aiders and abettors of deserters," were ratified at the same time, 7 July, 1863, and are to be construed together. So the question depends upon the meaning and proper construction of these two statutes.

At the meeting of the Legislature two questions were pending: (1) Congress in its wisdom having allowed substitution and many other exemptions from the conscription acts, was it in the power of the President, by calling upon the State for its quota of militia, to subject the persons so exempted as conscripts to military duty as militia? (2) Had the Governor authority to require the militia to arrest conscripts and deserters from the Confederate Army? By the first section of the act "in relation

to militia and a guard for home defense," the problem was solved, and it is enacted that all persons exempted as conscripts shall be likewise exempted from service as militia. By the third section of the act "to punish aiders and abettors of deserters," it is enacted that the Governor may require the militia to arrest deserters and conscripts, thus solving the second problem by authorizing the Governor to call (171) out the remnant of the militia, that is, those not exempted from militia duty, to perform a part of the duty of Confederate soldiers, to wit, the officers of the militia and the men between 40 and 45 who had not then been called for as conscripts.

In order, however, to provide for home defense, the Legislature assumed the power of making *State conscription.* Whether the Legislature had the power to do so is a question into which it is not necessary to enter. The power is expressly assumed, and it does not become a coördinate branch of the State Government to decide upon it unless it be necessary to do so in order to dispose of a case before it. So it may be granted that the Legislature had power to organize for home defense a military body composed of the remnant of the militia, the exempts and persons over the age, liable to militia duty. It is very certain that in doing so the intention was to make this new body wholly distinct and different from the militia. Persons exempt from militia duty are included, new companies are formed, new officers appointed—in fact, everything is different; it is a new organization—a State conscription made for two special purposes, "to be called out against invasions and to suppress insurrections" (section 6). And special care is taken to distinguish this new body from *militia,* for otherwise they might, under the Constitution, be called for by the Confederate States. Upon what ground, then, can it be insisted that the Governor is authorized to require this newly organized body and peculiar State institution to perform a part of the duty of Confederate soldiers? It is said the authority follows as a consequence of the military organization. I cannot see the force of the argument. In the act declaring the special purposes for which this new organization is made, no such authority is expressly given to the Governor; the power of the Legislature to confer it, even if such had been the intention, is by no means clear; and so we are not at liberty by implication to infer that such was the intention, and the act "to punish aiders and abettors of deserters" puts the matter, as it seems to me, out of the range of discussion, by *expressly authorizing* the Governor to use *the militia* to arrest deserters and conscripts, thereby excluding, as plainly as words could do it, any authority to re- (172) quire such service of this new organization—the State conscripts, Home Guard. *Expressio unius exclusio alterius* is a well established rule of construction which the courts are not at liberty to disregard;

and its soundness, when the object is to ascertain the intention of the Legislature and neither to fall short of it nor go beyond it, is fully illustrated by this case. So the two statutes relied on as confirming the authority of the Governor actually exclude it by a double implication. In the first place, the act authorizes the Governor "to call out the Home Guard against invasions and to suppress insurrections." Why was it not added, "and to arrest deserters and recusant conscripts," if such was the intention? That subject was present to the minds of the Legislature. In the second place, the act authorizes the Governor in so many words "to call out *the militia* to arrest deserters and conscripts." Why did it not add, "and also the Home Guards," if such was their intention? The conclusion that it was not the intention of the Legislature that the *Home Guards* should be subject to this service is as clear as if the acts had contained the words: *"Provided, however,* that the Governor shall not have authority to require the *Home Guards* to arrest deserters and conscripts," unless it be contended that the Governor has all power except such as is expressly prohibited—a position which, I suppose, no man will venture to assume.

The argument may be stated thus: The statute expressly authorizes the Governor to require "the militia," that is, the officers and men between 40 and 45, to arrest deserters—that is, they form a part of the Home Guard. It follows, the Governor had no authority to require the *whole body* of the Home Guard to perform this duty; for if he had such authority, it was vain, idle, and superfluous to authorize him expressly to require a part to do that which he had authority to require of the whole. In this connection the provision, section 9, "The commissions of the officers of the militia shall be suspended only during the period of their service in the Home Guard," has an important bearing, the object being to preserve the organization of the militia and to use
(173) them to arrest deserters, for which purpose the force was then adequate. The fact that, afterwards, the call for the men between 40 and 45 as conscripts made the force inadequate cannot change the meaning and proper construction of the statutes. If an amendment was thereby made necessary, the Legislature must make it; for neither the Governor nor the judges have authority to strain the law to meet the emergency.

I am aware of the responsibility under which I act. Jurisdiction is given to a single judge in vacation; my decision fixes the law until it is reversed by the Supreme Court, or amended by the Legislature and I would not feel it to be my duty to stay the action of the Executive, except upon the clearest conviction.

Whether in the event the Governor should call out the Home Guard to repel a raid or suppress an insurrection, he would not, while the men

were on this tour of service, which is limited to three months (section 6), have authority, collaterally, to require them to take up deserters and conscripts who might aid the enemy, is a question to be presented. We are confined to the naked question, Has the Governor authority to require the Home Guard to be called out for the mere purpose of arresting deserters and conscripts? The special order under which Major Harbin acted is for this purpose alone. It is true that the State was, before the passage of the acts, invaded, and the enemy was at that time and is now within the limits of our State; but the order does not profess to be made for the purpose of repelling that invasion; there is no "tour of duty prescribed by the Governor not exceeding three months at any one time," according to the provisions of the 6th section. The time is unlimited and the purpose is declared to be "to arrest every deserter and recusant conscript within the county of Davie, and deliver them to Colonel Mallett at Camp Holmes."

The suggestion that, as the arrest of deserters and conscripts would promote the efficiency of the Confederate Army, and thereby tend to defend the State against the invasion, the authority of the Governor can be sustained on that ground, involves a latitude of construction unsupported by any principle of law, and, as it seems to me, can- (174) not impress with much force the mind of any one who will read the two statutes attentively and in connection. He will see from the mode of defense contemplated by the Legislature in calling out the Home Guard for defense against invasion and insurrection, by regiments, battalions, and companies, on tours of duty within the State not to exceed three months, etc., that the indirect and far-off mode of repelling the existing invasion by arresting deserters and conscripts was not in the mind of the Legislature, except when the Governor was authorized to use the *militia* for that purpose, which, according to the view I have taken above, excludes the conclusion that the Home Guards for home defense—the State conscripts—were to be used for that purpose also. For, if so, it was surely vain, idle, and superfluous to impose that service on the militia, who constituted but a small part of the guard for home defense.

The position was taken on the argument, that the order under consideration clearly exceeds the Governor's authority, in this: It requires the Home Guards for home defense "to arrest and bind over to the court to answer said charges those citizens who aid, harbor, and maintain deserters," and is therefore void *in toto*. It is true, citizens who aid, etc., deserters, etc., although made liable to indictment by one of the statutes referred to, cannot, according to the Constitution and laws of the land, be arrested and bound over to the court to answer the charge, by military authority; that can only be done by the civil authority, to wit, a

warrant by a judge or justice of the peace on probable cause shown on oath, and executed by the sheriff or constable. So it is clear that part of the order is void and against law. But it does not vitiate the other part of the order, provided the Governor had authority to make it.

It is thereupon considered by me that Richard M. Austin be forthwith discharged. R. M. PEARSON, Ch. J., S. C.

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IN RE BOYDEN—HABEAS CORPUS.

In February, 1863, Captain Johnson was raising a cavalry company for the Confederate service, and Captain Hall an infantry company, in the county of Anson. Boyden volunteered in Johnson's company, and on 1 March procured one McLendon to enter Hall's company as his substitute. On 4 March, Polk, colonel of militia, certifies as follows: "This is to certify that John A. Boyden, a member of Cedar Hill militia company, has employed a substitute to serve for him and in his place during the present war with the United States, and he is hereby exempt from militia duty for the space of three years." And Johnson certifies as follows:

WADESBORO, 25 May, 1863.

This certifies that John A. Boyden, who volunteered in the Anson troops, has, by furnishing a substitute in a foot company, and a horse to supply a member of my company, discharged his duty as a volunteer of North Carolina and the Confederate States.

L. A. JOHNSON,
Capt., Anson Troops.

These certificates, together with the receipt of McLendon for $50, for taking Boyden's place as a substitute for the war, proved by Grimsly, the attesting witness, are attached to each other, with this indorsement: "Case of exemption." John A. Boyden "furnished substitute," "approved, exempted." "J. M. Little, E. O., etc." "I certify that these are the original papers filed in the office by Lieutenant Little. Peter Mallett, Colonel Commanding Conscripts, North Carolina. 6 October, 1863." On 26 February, 1863, Lieutenant Little gave Boyden a certificate as follows: "John Boyden is hereby exempt from military duty, by reason of having furnished a substitute, 51 years of age. When he ceases to be employed as such, this exemption is declared void." Indorsed "C. E. O., 21 May, 1863." "C. E. O., 6 July, 1863," meaning

that it was approved at those several dates. In August, 1863, Colonel Mallett read a letter from Lieutenant Colonel Polk, calling attention to a fraud practiced upon an old man in his regiment and the Government by one John Boyden of Anson County. This letter is referred to Lieutenant Little, 31 August, 1863, "who will have this party sent to camp. W. L. Cole, Capt. Commanding." It was returned with (176) the following indorsement: "Enrolling Office, Pittsboro, 3 September, 1863. Respectfully returned to commandant of conscripts." "This case has already undergone an examination, and the papers found correct. By reference to the papers of the 81 Regiment North Carolina militia, you will find his substituting papers correct. J. M. Little, Lieutenant and Enrolling Officer, 7 N. C. Conscript District." Upon the receipt of a letter from Major Boggan (reiterating the charges of fraud by Boyden on McLendon and the Government), and the affidavit of Captain Hall, stating that McLendon had enlisted in his company on or about 26 February, 1862, as a volunteer, and was considered a volunteer, and not a substitute, in his company; that he did not believe Boyden had engaged McLendon, until after he had been sworn in, as a substitute, Boyden was arrested as a conscript, and sued out a writ of *habeas corpus,* which was returned before me, 3 October, 1863, and after much of the evidence was heard, adjourned until 18 October, and was decided after argument by General Fowle for petitioner and written argument by Governor Bragg for the Government. Three grounds were taken to exclude Boyden from exemption: first, invalidity of the substitution by reason of fraud on McLendon; second, fraud on the Government; third, want of power in Polk and Johnson to discharge Boyden.

1. The fraud alleged to have been practiced by Boyden on McLendon is in this: that Boyden, under pretense of making him a present of $50 as a reward for his patriotism in going as a volunteer, had induced him to sign the receipt set out above, he being an ignorant man and not apprised of its contents. How far this allegation, if proven, would affect the validity of the substitution as between Boyden and the Government it is not necessary to consider, because, after a full examination, the allegation, so far from being proved, was clearly disproved. The witness Clark swore that, hearing Boyden wished to procure a substitute, and being told by McLendon that he would go as a substitute in a foot company for $50 (he objected to a cavalry company, not being a good rider), he communicated the fact to Boyden at Wadesboro, on 1 March, 1862, when Hall was raising his company; that a few days after- (177) wards McLendon told witness he had gone into Hall's company as Boyden's substitute, and asked him if it was true that the county would not provide for his wife and children, as he was a substitute. Clark told him that it was so. McLendon replied, before entering as a

substitute some people had told him so, but others said the county would provide for the wives and children of all soldiers, no matter how they went to the war, and he believed so when he became Boyden's substitute, but did not intimate that Boyden had ever said anything to him on the subject. A few days afterwards McLendon applied to Boyden to let him off, which Boyden declined. The other evidence confirms this state of facts, and shows that McLendon did become Boyden's substitute, and made no clamor about it until he found out he was mistaken as to the nature of the provision made by the county, in respect to which he had been put on his guard before becoming a substitute, and even then he made no complaint that Boyden had led him into error, his allegation being that he never had agreed to become a substitute, but had entered as a volunteer and received the $50 of Boyden as a present.

2. The fraud alleged to have been practiced by Boyden on the Government is this: that he procured McLendon to become his substitute *after* he had volunteered and was sworn in Captain Hall's company. Captain Hall swore that after the men who were going to join his company had been drawn up before the hotel door to be sworn, Boyden approached McLendon and wanted to speak to him, which he prohibited, saying he must wait until the men were all sworn in. They were then sworn in, and soon afterwards McLendon stepped off with Boyden. He had no recollection that McLendon was sworn in as Boyden's substitute. It was done about 3 o'clock in the evening; he took down the names on a piece of paper with a pencil as they were sworn in; does not recollect that the entry as to McLendon differed from the others. Being notified to produce the original paper, he stated that he had searched for it; it was lost; being a rough draft, it was not usual to keep such papers.

(178) Boyden makes affidavit that the entry was "John A. Boyden by Lewis McLendon"; when Hall made it, he asked if that would do, to which Boyden replied, "I suppose so." Witness Smith swore that he saw Boyden, on 1 March, at Wadesboro, about 12 o'clock, take McLendon off and have a talk to themselves, and it was generally understood that McLendon had agreed to become Boyden's substitute and joined Hall's company as such. Grimsley, the witness to the receipt, swore that while the men were drawn up before the hotel door, he is not certain whether it was just before or just after they were sworn in, Boyden and McLendon stepped into his room; Boyden said he was going to give McLendon $50 for his patriotism. Boyden drew the receipt, McLendon signed it, and Boyden paid him the money and he witnessed it. He supposed the parties understood each other, as the receipt was read over, and that McLendon either had or was just about to swear in as Boyden's substitute. There was much evidence tending to show that McLendon had agreed to become Boyden's substitute before he was sworn in, and

that he was sworn in as his substitute, and that the money was paid and the receipt signed a few moments afterwards; which circumstances, I am satisfied, gave color to and was suggestive of the rumor that he did not become Boyden's substitute until after he was sworn is as a volunteer, when, of course, it would have been too late. Captain Hall was mistaken as to the date of the transaction; it was on 1 March, and not on 25 February.

3. As Boyden had not been drafted by Colonel Polk, the case does not come within the decision *In re Ritter,* so the discharge by Polk is of no effect. The case turns on the validity of the discharge by Captain Johnson. Had Boyden put in McLendon as his substitute in Johnson's company, the case would have come under the decision of the Supreme Court *In re Kennedy,* a recruiting officer. Now, suppose Boyden had, on 1 March, himself joined Captain Hall's company with the assent of Captain Johnson, previously given, as presumed from his subsequent discharge on the receipt of the horse, under the maxim, *Omnis ratihabitio retrotrahitur et mandato equiparatur,* would the transfer have been valid? I am convinced that it would, by giving to the regulations in respect to transfers the same liberal construction that the regu- (179) lation in respect to substitutes (October, 1863) received in the matter of *Ritter* and *Kennedy.* The regulation is in these words: Article 15, 142, "The colonels may, upon the application of the captain, transfer a soldier from one company to another of his regiment." Article 143: "When soldiers are authorized to be transferred, the transfer will take place on the 1st of a month, with the view to the more correct settlement of their accounts." 144: "In all cases of transfer, a complete descriptive list will accompany a soldier transferred, which roll will contain an account of his pay, clothing, and other allowances, also all stoppage to be made on account of the Government and debts due the laundress, as well as such other facts as may be necessary to show his character and military history." It is clear that while companies are in the act of being formed, a compliance with these details, which are made material when the party is in service, in order to prevent confusion, as back pay, indebtedness, description, first day of month, character and military history, etc., is not necessary, and should be dispensed with by a liberal construction, for when the companies are in the act of being formed, no considerations of that nature are presented, and the purpose is fully answered if the two captains consent that the man may withdraw from one company and join the other; certainly there can be no necessity for an application to the colonel of the regiment, and the matter must rest in the discretion of the captains who are endeavoring to raise the companies, because the companies are in an inchoate state and there is no regiment or colonel. It seems to me the analogy is perfect,

and that the transfer in the case supposed must be held to be valid, or the principle established by the decisions in the cases of *Ritter* and *Kennedy* must be overruled or disregarded. The fact that the one was to be cavalry and the other an infantry company cannot prevent the application of the principle, because neither company was organized or attached to a regiment. In our case Boyden did not himself join Hall's company, but put in a substitute, which fact raises the case only to the extent of requiring a direct application of the same principal fact in regard to the transfer and then to the substitution, and although (180) it makes the case more complicated, the conclusion must be precisely the same, as the result in compound is as true as in simple multiplication. I am fortunate in having my conclusions as to the construction of the army regulations confirmed by the fact that Mr. Boyden's substitute papers have been time and again passed on by Lieutenant Little, E. O., and adjudged by him to be valid, and also have received the sanction of Colonel Mallett, commandant of conscripts, who filed them in his office without exception, and I think it clear the matter never would have been stirred but for the suggestions of fraud which, upon full examination, turn out to be untrue, although in respect to both charges, upon the clamor of McLendon, there may have been sufficient color to make an investigation proper.

It is, therefore, considered by me that John A. Boyden be forthwith discharged, with leave to go wheresoever he will; the costs to be taxed by the clerk of the Superior Court of Anson County will be paid by F. Darley. The clerk will file the papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

17 October, 1863, at Richmond Hill.

IN RE CURTIS—HABEAS CORPUS.

CURTIS is under 35 years of age, a minister of religion, of the denomination called "Primitive Baptist," authorized to preach according to the rules of his sect; and has been heretofore in the discharge of ministerial duties in Caldwell, the county of his residence, and exempted from conscription on that ground. In October last, Curtis agreed to become the substitute of one Foster, in 10 Regiment of Cavalry, Army of Virginia, and in execution of that agreement left home and went as far as Salisbury, 70 miles, where he was arrested as a conscript, and sued out a writ of *habeas corpus.*

The question is of great practical importance; on the one hand, if exempts may legitimately become substitutes, a new source of supply will be opened to those who wish to leave the army or keep out of it; on the other, the people at home will be deprived of serv- (181) ices necessary for their subsistence and well-being. My duty is simply to expound the law. In its discharge I have been much aided by Mr. Graham, who filed a written argument for the petitioner, and Mr. Sharpe, who appeared for the Confederate States. After full consideration, I am convinced that the agreement to become a substitute, and *the entering upon the execution of the agreement,* put an end to the exemption, and made Curtis liable to conscription, because he had ceased to be "*in* the regular discharge of ministerial duties."

A perusal of the exemption act will satisfy any one that the exemption of editors of newspapers, ministers of religion, physicians, shoemakers, blacksmiths, etc., was made, not for the purpose of conferring a special privilege on individuals, but for the benefit of the people at home, who required the services of physicians, shoemakers, blacksmiths, millers, etc., to enable them to live, and the services of editors and ministers of religion for their intellectual and religious support. The exemption is restricted to the editor of a newspaper *now being published,* a minister of religion *in the regular* discharge of ministerial duties, a physician *now in actual* practice, shoemakers, blacksmiths, millers, etc., *actually employed* at the time *at their trades.* From the words, and the object in view, the law implies that the exemption shall cease when the services cease to be rendered to the public; for the services are the reason and consideration on which the exemption is based, and when the one ends the other ends, by operation of law and by force of an implied condition which my Lord Coke says "the law tacitly annexes by reason of the object, and the nature of the subject-matter, to prevent the policy of the statute from being defeated." No more striking illustration of the wisdom of this tacit act of the law can be presented than is furnished by the case under consideration. The object of the statute was to keep an army in the field, and at the same time enable the people at home to support themselves; for this purpose a man is left out of the army to discharge ministerial duties for the people, another to attend them in sickness, another to make shoes, and another to sharpen their plows. Suppose the men left out of the army for these purposes are (182) tempted by large sums of money to quit their vocations and go into the army as substitutes: the army gets a man and loses one; the people lose the services of one, without any equivalent. The army gains nothing, the people worse, and the individual pockets $5,000 or $10,000! The law would not be true to itself if it did not *proprio vigore* prevent such a perversion of its policy.

To meet this view of the subject, Mr. Graham takes three positions: (1) "It may be said that it is for the benefit of the public and not of the individual that the exemption is granted. Be it so; there is no means provided by the statute of securing the supposed benefit to the public; that is left to the voluntary rendition of it by the exempt." He may, if he chooses, quit his vocation and join the army; certainly he may do so as a volunteer, and there is no reason of policy why he may not do so as a substitute. Or he may migrate to another State, or run the blockade, and in all such cases the public loses the services on account of which he was exempted.

The learned counsel in assuming that "no means is provided by the statute of securing the supposed benefit to the public," begs the question, for the liability to conscription of one who quits his vocation is predicated on the condition which the law tacitly annexes for the purpose and *as the means* of securing the benefit to the public. True, a minister of religion, or shoemaker, may quit his vocation and join the army as a volunteer recruit, and the public will lose his services in his vcoation; but the army gains a soldier—has two instead of one; and in this lies the distinction between that case and one of substitution; there the army gains nothing and the public lose. It is also true, a minister of religion or shoemaker may migrate to another State, and the public lose his services; but he thereby becomes liable to conscription in the State to which he goes by force of that same tacit act of the law, and the army gains a soldier; so it is true an exempt may take his chance to run the blockade; a soldier may likewise desert and run the blockade, and if he escapes, there is no help for it, not from a defect in the law, but because it cannot reach him. I will add to the list: a man may quit his
(183) vocation and stay at home, and thus deprive the public of his services, but by force of this implied condition he becomes liable to conscription, and the army gains a man. These considerations demonstrate, as it seems to be, that such a condition must be implied, otherwise all who are exempted by reason of being actually employed in serving the public, as soon as the exemption is consummated, may quit their vocations and go as substitutes for large rewards, or remain at home in idleness or enter into speculation. The condition which the law tacitly annexes effectually guards against all of these evils.

2. "If forfeitures were contemplated, undertaking service as a substitute soldier is not one of them; it is not a forfeiture for nonuser." See 2 Blackstone, 153.

The duties of a soldier or officer and a minister of religion are not incompatible. Mr. Graham refers to the instance of the Rev. Dr. Hall, who, in the Revolution, was a captain of a company and chaplain to a regiment, "fighting or preaching as occasion offered." Foote's Notes

N. C. Bishop and Lieutenant General Polk, Captain Pendleton, and others. In such cases the church to which the individual belongs, if they disapprove such conduct in a minister, may visit him with its penalties of deprivation, etc.; but it is not perceived how the *lay* authorities, either military or civil, shall ascertain and declare that a minister of religion has ceased to be a minister and subject him to forfeitures and penalties therefor; it is an ecclesiastical question affecting one's right "to worship God according to the dictates of his own conscience," with which government is forbidden to interfere.

The learned counsel has fallen into error in supposing that the exemption is annexed to *the office* of a minister of religion, and that the implied condition involves a forfeiture of the office, so as to call for a sentence of deprivation; whereas, it has no more concern with the question whether the individual continues to be a minister of religion than whether one continues to be a physician or a shoemaker. The exemption is annexed to the services of the individual, so that when a minister of religion ceases to be *in the regular* discharge of ministerial duties, or a physician ceases to practice, or a shoemaker to make shoes for the public, the exemption ceases, notwithstanding he may still be (184) a minister of religion, a physician, or a shoemaker by trade. How it would be in the case of a judge or a member of the Legislature, and others holding *public offices* (where, it may be, the exemption is annexed to the office), should any of such officers become substitutes, and whether a judgment of forfeiture would be necessary before they become liable to conscription, is a question into which I will not enter, for it is certain that in case of a *public office,* as a minister of religion, or a profession of a physician, or the trade of a shoemaker and the like, no deprivation of the profession, office, or trade is involved, and they may take it up again, as soon as the war is over or they are allowed to leave the army. The point is, that supposing them to continue to be ministers of religion, physicians, or shoemakers, they have ceased to serve the public in their vocations. So, likewise, the question of "incompatibility" is not involved; for admit a minister of religion, who is a soldier, may preach when his officers permit him, still he is not *in the regular* discharge of ministerial duties; so a physician, while in camp, may administer a dose of medicine, still he is not in the actual practice of his profession; or a shoemaker may mend or make a pair of shoes, or a blacksmith may shoe a horse; still they are not actually employed in serving the public in their trades. In other words, although such soldiers may be at times useful in that way, it is not their regular business.

3. "A forfeiture of exemption cannot be incurred until some act is done which binds the exempt to duty—that is, until he signs the articles of enlistment and is sworn into service. Until that is done, he has his

locus penitentiæ, and may refuse to fulfill the contract and return to his flock in the county of his residence. A forfeiture would surely not be enforced merely upon a declaration of intention to enlist in conversation, or upon an executory agreement to that effect."

It may be conceded that an *agreement* to become a substitute, the man still continuing in the regular discharge of ministerial duties, would not cause his exemption to cease; but our question is, after making the agreement, he enters upon its *execution,* to wit, leaves home, starts to (185) the army, and goes 70 miles on his way: is that an act by which he ceases to be in the regular discharge of his ministerial duties? That is the question. It certainly will not do to allow the door to be left open for the *locus penitentiæ* until the man is actually received as a substitute and the principal is discharged; for, if so, the time to enforce the implied condition will be past; he cannot be made a conscript after he has been received as a substitute. There must, consequently, be some intermediate stage at which the exemption ceases and he becomes liable as a conscript. My conclusion is that stage is when, after making an agreement, he does some act in part execution of it showing unequivocally a purpose to abandon his former vocation and cease to render to the public the services in consideration of which he had been exempted. The act of leaving home, starting to the army, and going 70 miles on his way is one of that character.

Whether, if Curtis had been allowed to execute his agreement fully and been received as a substitute, the substitution would not have been void, on the ground that he had himself become liable to military duty, is a question which suggests itself, but need not be determined. I suppose, however, if he did not become liable, as a conscript, until the thing was done, that is, until he signs the articles of enlistment and is sworn into service, the substitution would be valid. If so, it furnishes an additional reason for having some intermediate stage in order to give effect to the law and prevent the condition from being nugatory.

It is considered that Samuel Curtis be remanded, and that he pay the cost of this proceeding, to be taxed by the clerk of the Superior Court of Burke County, who will issue an execution if necessary.

The clerk will file the papers in his office and give copy.

R. M. PEARSON, C. J., S. C.

Richmond Hill, 10 November, 1863.

(186)

IN RE F. W. KIRK—HABEAS CORPUS.

KIRK is 31 years of age, and on the 18th ult. was arrested as a conscript, by order of Brig. Gen. Robert F. Hoke, and sued out a writ of *habeas corpus,* claiming exemption as a captain of the militia of Yadkin County.

The return sets out that "Kirk was arrested by order of General Hoke, by virtue of verbal orders from Governor Vance to arrest the militia officers of the counties of Yadkin and Wilkes as persons subject to the Conscription Act."

The act of Congress, 11 October, 1862, excepts "the officers judicial and executive of the Confederate and State Governments," etc., except such State officers "as the State may have declared or may hereafter declare by law to be liable to military duty." The legislation of the several States in respect to the liability of State officers to militia duty was not uniform. In some certain officers were liable, in others not, which caused the exemption act to be unequal in its operation. The Governor of Georgia claims that "militia officers" could not by the act of Congress be made subject to conscription, being officers required for the due administration of the State Government.

To meet this state of things, the exemption act was amended 30 April, 1863, and it is provided: "All State officers shall be exempted whom the Governor of any State may claim to have exempted for the due administration of the government and laws thereof; but this exemption shall not continue after the adjournment of the next regular session of the Legislature, unless such Legislature shall, by law, exempt them from military duty in the provisional army of the Confederate States." In pursuance of this act Governor Vance claimed to have exempted the militia officers of this State, and they have been considered and treated as exempted, until Kirk was arrested under the order of Governor Vance, referred to in the return. The case depends on the validity and legal effect of that action on the part of the Governor.

Mr. Dodge, for Captain Kirk, insisted on the argument that by the proper construction of the amended exemption act the Governor having claimed certain officers, the act contemplated by the law was done, and the Governor in respect thereto *functus officio,* and the militia and other State officers embraced in the claim were *ipso facto* (187) exempted, and this exemption continued until the adjournment of the next regular session of the Legislature. That it was not in the power of the Governor to open and shut, from time to time, at his pleasure, and make liable to conscription persons who were exempted under the act of Congress and his claim in pursuance thereof. He further

insisted, should he be mistaken in this, that the Governor certainly had not the power to take away the exemption in respect to particular individuals of a class, at his pleasure, leaving the other individuals of this class still exempted; that he must act upon classes of State officers, and could not reach individuals unless charges were preferred, and they were on trial by a court-martial deprived of their offices. And more especially that he could not discriminate between the officers of different counties by conscripting the officers of one or two and letting the officers of the other counties remain exempted. That such power could not be conferred on one man, because it was against the genius of a free government and was the essence of despotism—"the one-man power."

Mr. Winston, for the Confederate States, insisted that by the proper construction of the act power was conferred on the Governor to claim to have exempted from time to time such State officers as he should think necessary for the due administration of the Government and laws thereof, and it was proper to give him an opportunity to try how many officers were necessary. He could see nothing in the act or in our form of government requiring the Governor to exempt by classes, or restraining him from saying "he no longer needed the services of this or that individual, or the officers of this or that county." And that by General Order No. 6, 17 May, 1863, the Governor had reserved to himself this power, which was like a power of revocation in a deed which one creating an estate under a power of appointment thought proper to insert in order to enable him to avoid the estate. And he insisted this "power of revocation" made by the Governor was fit and proper to enable him to exact prompt obedience on the part of his officers, as the matter could not be dealt with by a court-martial. The clause (188) in the order referred to is as follows: "Militia officers are hereby exempted from the operation of the Conscription Act so long as they yield prompt obedience to the orders issued from this office. The services of refractory and negligent officers will not be considered as necessary for the due administration of the Government and laws of the State."

In reply, Mr. Dodge relied on General Order No. 13, 10 July, 1863, in which certain State officers, among others, county solicitors, militia officers, the mayor and police of Raleigh, Wilmington, etc., are set out as exempted, under the act of 30 April, 1863, without qualification or "power of revocation" as revoking General Order No. 6, even if the Governor had the right to add a qualification, or power of revocation, which he denied.

I have given this sketch of the positions assumed by the counsel, as tending to elucidate the subject, and to aid me, in some measure, in setting out the ground of the conclusion to which I have come, that the

order of the Governor does not, in law, have the effect of avoiding the exemption of Captain Kirk and the other militia officers of the counties of Yadkin and Wilkes, which had been effected by the previous act of the Governor under the act of Congress, 30 April, 1863.

The function of designating what officers are necessary for the due administration of the Government and laws of the State is a matter of legislation, which belongs to the General Assembly, but at the time, when it seemed fit in the wisdom of Congress to amend the exemption act, the Legislatures of the States were not in session, and the plan adopted by Congress was not *confer* power on the Governor to exempt State officers; for the Governors derive their power from the Constitution and laws of the States and not from Congress, but to make the operation of the act of Congress depend on the action of the Governors in claiming certain State officers for the due administration and laws of the State. The legitimacy of this mode of legislation, by which the *operation* of a law is made to depend upon the act or election of *one* man or of a number of men was at one time seriously questioned, and many grave considerations may be urged against it. The subject is discussed in *Manly v. Raleigh,* 57 N. C., 370. The authorities are cited and it is held the Legislature (and, for like reasons, Con- (189) gress) has power to legislate in that way. Still, it is only resorted to when made necessary by peculiar circumstances, and the act should be construed strictly, so as not to carry it beyond the exigence of the circumstances which gave rise to it.

I can see nothing in the act of Congress which intimates an intention to put it in the power of the Governors, from time to time, to enlarge or contract the list of State officers claimed for the due administration of the Government and laws of the State. On the contrary, the words used plainly contemplated a single act on the part of the Governor, to wit, making a claim for the necessary State officers, which was to have the effect of exempting them. Indeed, the words, "But this exemption shall not continue after the adjournment of the next regular session," etc., are inconsistent with the notion that the act was to be repeated from time to time.

Mr. Winston conceded that it was not in the power of a Governor, after a State officer has been conscripted, to enlarge the clause so as to include such officer in the list of exempts. This being so, it is difficult to see how the same words can have the effect to enable a Governor to curtail the claim, and exclude an officer from exemption. There is nothing in the act to show that, in the opinion of Congress, it was either necessary or proper that the Governors should have an opportunity of "experimenting" in regard to what State officers are required for the due administration of the Government and laws thereof. It was reason-

able to presume the Governors possessed this knowledge, or could acquire it by the perusal of the acts of the Legislature then in force, which would enable them to take the action necessary to effect the exemption, which was to continue until it could be known whether, in the opinion of the Legislature, any change in the law was called for.

In the other view of this case, there is much force in the objection urged by Mr. Dodge to the verbal orders of Governor Vance to General Hoke in reference to the militia officers of the counties of Yadkin and Wilkes. It is, in my opinion, contrary to the genius of our free
(190) institutions to put it in the power of any one man to say to a county solicitor, for instance, "Do my pleasure, or I will send you to the camp of instruction as a conscript," or to the mayor and police at Raleigh, "Each and every one of you must act to please me, or I will send you to Camp Holmes as conscripts," or to the officers of the militia in Yadkin County, "Obey my orders promptly, and see to it that no one is refractory; for if so, I will send not only him, but the whole of you, to Camp Holmes as conscripts." Such a power might lead to oppression, and become dangerous to liberty. There is no precedent to support it in the history of any free people. So, according to a well settled rule of construction, it shall not be taken that it was the intention of Congress so to legislate as to enable the Governor to exercise such unlimited sway over the State officers. (See my opinion *In re Finley,* next case.)

The position of Mr. Winston, that, supposing the act of Congress not to confer the power, Governor Vance had in respect to the militia officers reserved it by General Order No. 6, is not tenable, and the analogy on which he replied, drawn from the doctrine of powers of appointment and revocation, in fact overthrows his position. The party which exercises a power of appointment cannot create a power of revocation. One who makes an estate can annex a condition by which to defeat it; so, the *maker* of a power of appointment may, by the same instrument, make a power of revocation, and he is the only one who can make it. According to this doctrine, it was necessary for Congress to make the power of revocation, which the argument assumes not to have been done.

But I do not attach much weight either to Order No. 6 or Order No. 13. The exemption was not effected by them, in fact. They presuppose and are predicated upon a prior action on the part of the Governor, by means of which the exemption had been effected, and the part of Order No. 6 relied on by Mr. Winston as a power of revocation must be considered as a matter *in terrorem* only—a rod held up to make the officers of the militia prompt in their obedience, and it was superseded by Order No. 13.

It is considered that F. W. Kirk be forthwith discharged, with (191) leave to go wheresoever he will. The costs, to be taxed by the clerk of the Superior Court of Yadkin County, will be paid by Robert F. Hoke. The clerk will file papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

7 November, 1863.

IN RE FINLEY.—HABEAS CORPUS.

THE facts are: Finley is a native of Baltimore, in Maryland, and had for many years been a merchant in Baltimore. In May, 1861, his political sentiments being on the side of the Confederate States, he left Baltimore and came to Asheville, North Carolina, with no intention of changing his domicile, but with the intention of staying in Asheville until the war was over, and, in the meantime, of collecting or securing debts due him in this State and in Tennessee, Georgia, and South Carolina; he has been, the most of the time, in Asheville, where he boarded at a hotel by the month, and visited other places in the above named States as business required; he is 36 years of age and a single man.

In October, 1863, he was ordered out to do military service as one of the "home guard," by Major J. W. Woodfin, and upon his refusing to serve he was arrested and sued out the writ of *habeas corpus.*

Mr. Winston, for petitioner, assumed the grounds:

1. The act of the Legislature is unconstitutional for the reason that a regular army and the militia are the only military organizations recognized by the Constitution of the Confederate States, or of this State, and the act in question makes a new military organization, which supersedes the militia and defeats and makes of no effect the power of the Confederate States over the militia.

2. The petitioner being a foreigner, who has not acquired a domicile in this State, to subject him to military service would be a violation of the law of nations and international comity, which it will not be taken that the Legislature intended to commit. (192)

3. The petitioner is a subject of a country with which we are at war; an "alien enemy," and is not embraced by the act of the Legislature.

I. The constitutionality of "the act in relation to the military and guard for home defense," although presented by the facts, is a question which it is not necessary to decide in order to dispose of the case, according to the view I take of it, and I do not, therefore, enter upon its consideration.

II. Assuming that according to the law of nations and international comity the subject of another government, who is a resident but has not acquired a domicile here, cannot be required to do military service in order to repel invasion and aid in establishing our independence, and assenting, as I do fully, to the position that when the words of a statute will admit of any other construction, it will not be taken that the Leglature intended to violate the law of nations and of international comity, still there is no provision either in the Constitution of the Confederate States or of the State which prohibits the Legislature from doing so, and if the words are used, showing clearly and unequivocally that such is the intention, the law is valid, and there is no ground on which the courts can decline to give effect to it from respect to the law of nations. In putting a construction on the conscription acts, the general words, "all white men *who are residents* of the Confederate States," etc., are held not to embrace subjects of another government who are residents, but who had not acquired a domicile here. The statute under consideration, besides the general words, "all white male persons residents in this State," adds the words, "*including foreigners not naturalized who have been residents* in the State for thirty days." These words are clear and unequivocal, and, as it seems to me, admit of no other construction than that it was the intention of the Legislature to include foreigners who had been residents here for thirty days, without reference to the fact of domicile, on the ground that to repel invasion and prevent our subjugation the principle of comity on which the law of nations is based should be to a certain extent disregarded; and it is the intention to re-
(193) quire foreigners who are residents, as distinguished from itinerants or travelers, to take up arms and aid in our defense. So my construction is that an Englishman or a Frenchman who had resided here for thirty days would be embraced by the act.

III. The petitioner is not simply a foriegner who is a resident here, like an Englishman or Frenchman, but he is "alien enemy," here by the permission of our Government. Should he bring an action, and to the plea, "alien enemy," take issue, it would be found against him, and he could only avoid the plea by confessing and putting in a special replication that he is a resident here by the permission of the Government. "Foreigner," the word used in the statute, in its general sense, includes all persons who are not citizens of this State or the Confederate States; but in the law books, state papers, histories, and in conversation, it is commonly used to signify citizens of other countries, neutral in their relations to us. In order to designate the citizens of a nation with which there is a state of war, the word "enemy" or "alien enemy" is appropriate. So, upon the principle of construction above referred to, which applies with increased force in the case of an alien enemy, for reasons

which I will state, I am convinced that the statute, under the general word "foreigner," does not embrace an alien enemy, for, in that case, it is not a mere question of comity, but other considerations are involved which may deeply concern the safety of the State, and which force upon us a different construction, to avoid a violation of the immutable principles of justice. A soldier has to be trusted; a faithless sentinel may sacrifice a whole army; or an alien enemy, acting as a soldier, may desert and give information of vital importance. So nothing short of direct words will justify the conclusion that it was the intention to make soldiers of them, and it should only be done by voluntary enlistment, with the express sanction of the Government and full notice of the fact. Would we trust a citizen of Massachusetts, who had resided here thirty days, as a soldier in our army? In the eye of the law, a citizen of Massachusetts and a citizen of Maryland are on the same footing. Again, if a citizen of Massachusetts or of Maryland takes up arms and fights in our defense, he will not, even in the view of the subject (194) taken by our Government, be entitled to be treated as a prisoner of war. The United States would have a right to deal with him as a *traitor,* and not a citizen of a belligerent nation. Under the general word "foreigner" can it be taken that the Legislature intended to force a man to incur the guilt of treason, where the words are plainly susceptible of a construction which excludes "alien enemies"? Here the rule of construction is pressed on us, not to avoid a violation of comity, but to avoid the commission of a positive wrong—a crime. Instances of the application of this rule of construction are to be met with in all of the works. A familiar one: A., having an estate in fee simple, enfeoffs B. *for life;* it is taken to be for the life of B., as most beneficial to him; but if one having an estate for his own life enfeoffs B. for life, it shall be taken for the life of the feoffor, because it would be wrong to make an estate for the life of B.; a forfeiture would be incurred. In our case the word "foreigner" is satisfied by confining it to the subjects of neutral nations, and cannot be taken to embrace a citizen of Maryland—an alien enemy—without forcing men to commit treason, and thereby incurring the highest forfeiture known to the law.

The petitioner stands on a different footing from a citizen of Kentucky or Missouri. Those two States are claimed by our Government as belonging to the Confederate States. Their citizens fighting in our armies may consequently expect to be treated as prisoners of war; but we have, as yet, no higher pretension to the State of Maryland as being a member of the Confederate States than to the State of Massachusetts; and for the purpose of this discussion, the citizens of Maryland and Massachusetts are to be viewed in the same light.

If there be citizens of those States, or any of the other States which still belong to the United States, residing among us, with the permission of our Government, they cannot by any but direct and unequivocal words be forced into our armies to repel invasion; and it is to be presumed that whenever their presence is supposed to endanger the public safety the permission to reside here will be withdrawn, and the Government will require them as "alien enemies" to depart.

(195) It is considered by me that R. S. Finley be discharged, with leave to go wheresoever he will. The clerk of the Superior Court of Buncombe County will file the papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

Richmond Hill, 7 November, 1863.

IN RE PRINCE—HABEAS CORPUS.

WHERE the substitute is under the age of 18, and the substitution is made under the conscription acts, it may be a presumption of law, there being an act of Congress by which the Government will be entitled to the services of the substitute at the age of 18, that the substitution was made in reference to this state of things, to wit, the prospective liablity of the substitute, by reason whereof the legal effect of the substitution is restrained, so that should the war continue so long, the Government will then be entitled to the services of both substitute and principal. But where the substitution is made before the passage of the conscription acts, under the regulation of the War Department, October, 1861, there being no act of Congress in force making citizens, either presently or prospectively, liable to service in the Confederate Army, the age of the substitute is immaterial; it can make no difference whether he be under or over the age of 18, or of what age he is, the only essential requirement being that he is "an able-bodied man, fit for military service in the field"; consequently the substitution cannot be presumed to have been made in reference to the age of the substitute, and there is nothing to restrain the legal effect of the substitution. So that should the war continue until the substitute arrives at a certain age, say 18 or 25, or any other age (for we might well suppose one age as another to have been in contemplation), the Confederate Government would then be entitled to the services of both substitute and principal.

Under the regulations of October, 1861, above referred to, the fact of substitution for the war, certified by the militia colonel, holding a draft, as in *Ritter's case, ante,* or by the captain, who was raising a company of volunteers, as in *Kennedy's case,* had the legal effect of exempt-

ing the principal for the war, the addition by the colonel or captain of the words, "and the principal is discharged from military service in the Confederate armies for the war," is mere surplusage, be- (196) cause it simply sets out a conclusion of law from the fact that the substitute had been received in place of the principal for the war; in other words, it is the law which discharges the principal, and not the colonel or captain.

In this case the substitute was under 18, but he was put in and received by the colonel for the war (5 March, 1862), but the certificate of the colonel, instead of expressing the conclusions of the law, that the principal was thereby exempted for the war, sets out that he is exempted until the substitute arrives at the age of 18; and the question is, Does this surplusage vary or annul in part the conclusion of law by which, from the fact of substitution for the war, the principal *ipso facto* was exempted for the war?

It seems to me that a mere statement of the proposition is a full answer, and the matter, when fairly presented, is too plain for argument. The colonel might just as well have said that the principal was exempted until the substitute arrived at the age of 21 or 25, for we have seen that, at that time, there was no act of Congress in force having reference to any particular age or making the age of the substitute at all material, and, of course, the colonel could not vary or annul the legal effect of the fact of substitution, and there was no act of Congress which could, by reference, vary the legal effect. For the sake of illustration, suppose an enrolling officer, under the exemption act, should certify that a man is a shoemaker, skilled at his trade, and actually employed working for the public, etc., and thereupon give him a discharge for six months; it is evident that the man is exempted "so long as he continues to work at his trade," because that is a conclusion of law, from the facts, and does not in any degree depend on the discharge which the officer may see proper to set out.

It is considered by me that Miles H. Prince be forthwith discharged, with leave to go wheresoever he will. The costs to be taxed by the clerk of the Superior Court of Wake County, and will be paid by John A. Spears. The clerk will file the papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

At Richmond Hill, 17 October, 1863.

MEMORANDUM

R. B. Gilliam, Esq., was elected judge of the Superior Courts in the place of Hon. Thomas Ruffin, Jr., resigned.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1864

STATE v. WILLIAM CODY.

(1 Winst., 197.)

A charge in a bill of indictment that the prisoner committed a burglary by feloniously breaking and entering into the dwelling-house of the prosecutor with intent to steal his goods, is supported by proof that his intent was to rob the prosecutor.

INDICTMENT for burglary, tried before *Shipp, J.*, at Court of Oyer and Terminer for LINCOLN, on 1 February, 1864.

So much of the case as is material is stated in the opinion of the Court.

**Winston, Sr., for the State.*

No counsel for the prisoner in this Court.

BATTLE, J. We are of opinion that there is but one question presented by this case upon which the least doubt can be entertained. The bill of indictment charges that the prisoner committed a burglary by feloniously breaking and entering into the dwelling-house of the prosecutor in the night-time, with the intent to steal, take and carry away his personal chattels; and the counsel for the prisoner contended on the trial that the testimony tended to prove that the breaking and entering was with the intent to commit a robbery and not a lar- (198)

*In the necessary absence of the Attorney-General, at his request Mr. Winston argued his cases for him.

ceny, and that, therefore, there was a fatal variance between the allegation and the proof. The question thus raised is found upon examination to be against the prisoner. Robbery and larceny are both felonies and of the same general kind, the former being an aggravated species of the latter. Hence, upon an indictment for a robbery, the prisoner may, if the facts proved in evidence justify it, be acquitted of the robbery and found guilty of the larceny. *Rex v. Gnosil,* 11 Eng. C. L., 400; *Regina v. Walls,* 61 Eng. C. L., 214; 2 Russ. on Crimes, 91. This shows that the charge of commission of larceny is included in that of the commission of a robbery; and it follows that if the charge be of an act done with intent to commit the former offense, it is included in a similar charge with the intent to commit the latter. His Honor in the court below was therefore fully supported by authority when he said that it made no difference whether the testimony proved that the burglary was committed with the intent to commit a robbery or larceny. If it were proved that the felonious intent were to rob, it included proof of the intent to steal, and therefore it sustained the charge contained in the indictment. No error.

Cited: S. v. Halford, 104 N. C., 877; *S v. Brown,* 113 N. C., 647.

THOMAS ADAMS v. RICHARD M. JONES.

(1 Winst., 199.)

1. If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail.

2. And the sheriff is said to fail to take bail when the paper returned by him as a bail bond is so defective and imperfect as to be adjudged not to be such.

(199) SCIRE FACIAS to charge the defendant as special bail of one Campbell, tried before *Osborne, J.,* at Fall Term, 1862, of ORANGE, upon the following statement of facts agreed on by the parties:

The plaintiff brought an action against one Campbell and one Jackson, in Orange County Court, and the defendant being the sheriff of that county, arrested Campbell and Jackson by virtue of the writ, who, together with one Hedgepeth, under their hands and seals executed an instrument of writing, which is set out in *Adams v. Hedgepeth,* 50 N. C., 327, and which was returned to the county court by the defendant as a bail bond. After the judgment obtained in the original suit, Camp-

bell left the State, and Jackson, the other defendant, being insolvent, the plaintiff sued out a *sci. fa.* against Hedgepeth as bail, and it was decided that the aforesaid paper-writing is not a bail bond. This suit was then commenced. No exception was taken to the said paper-writing as a bail bond at the return term of the writ in the original suit, or at any other time, and no notice was given to the defendant respecting the matter of bail or the insufficiency of the paper as a bail bond. Judgment was given for the plaintiff.

Graham for plaintiff.
No counsel for defendant in this Court.

BATTLE, J. The sheriff or other officer who arrests a defendant by virtue of a writ in a civil case will, according to the provisions of the Revised Code, ch. 11, sec. 1, become special bail for the party arrested, whenever he shall fail either to take a bail bond or the bail returned be held insufficient on exception taken and entered the same term to which said process shall be returnable, and due notice thereof given to the officer. The exception and notice are clearly not required where no bail is taken at all; and a paper, though intended as a bail bond, which is so defective and imperfect as to be adjudged not to be (200) such, cannot be regarded as the taking of bail.

It follows that the sheriff or other officer who returns such a paper instead of a proper bail bond must be held as special bail, though no exception were taken nor notice given. See *Adams v. Hedgepeth,* 50 N. C., 327.

The judgment must be Affirmed.

PETER PLIMMONS v. WILLIAM FRISBY.

(1 Winst., 201.)

Where the applicant for a cartway over the land of another has already one or more convenient rights of way over the land of another to the public road or other public place to which he seeks access, his application shall be rejected, and if an order for a cartway has been previously obtained, the cartway will be discontinued on the petition of the owner of the land under Rev. Code, ch. 101, sec. 38.

PETITION to discontinue a cartway, tried before *Shipp, J.,* at Spring Term of BUNCOMBE, 1864.

The defendant had obtained an order for laying off a cartway leading to his mill through the plaintiff's land, and the way had been laid off accordingly. This petition was filed in the county court to discontinue the way, and came to the Superior Court by appeal. On the trial in the Superior Court it appeared that the defendant is, and has been for many years, the owner of a gristmill, to which five different roads lead; that these roads have been traveled for many years, three of them for more than twenty years, and how much longer did not appear, and that these three had been used by the public for that time and more, but it did not appear that any of the roads had been laid off by order
(201) of the county court, or that any overseer lawfully appointed had ever worked on them. In order to pass over said cartway it would be necessary for passengers to pass by the end of two of said roads that had been used by the public constantly for more than twenty years.

The judge ordered the cartway to be discontinued and gave judgment against the defendant for the costs.

Merrimon for plaintiff.
No counsel for defendant in this Court.

BATTLE, J. This was a petition to discontinue a cartway which had been laid off according to the provisions of Rev. Code, ch. 101, sec. 37. The proceeding was instituted under section 38 of the same act which declares that "cartways laid off according to the preceding section may be changed or discontinued upon application of any person concerned, under the same rules of proceeding as they may first be laid off, and upon such terms as to the court may seem equitable and just."

We have decided at the present term in *Burgwyn v. Lockhart, post*, 264, that where the applicant for a cartway over the land of another has already one or more convenient rights of way to the public road or other public place to which he seeks access, so that it will not be "necessary, reasonable, and just" that he shall have the cartway laid off, his application shall be rejected, though such rights of way over the lands of others be not cartways. That decision disposes of the present case. There are several other ways leading to the defendant's mill which were constantly used by him and the public, and it was not "necessary, reasonable, and just," therefore, that the plaintiff's land should be bur-
(202) dened with the cartway. The order of the court to discontinue it was proper, and must be

Affirmed.

C. D. SMITH *v.* NORTH CAROLINA RAILROAD COMPANY.

(1 Winst., 203.)

In an action by a passenger on a railroad against the company to recover damages for the loss of his trunk, the plaintiff is not a competent witness to prove the loss of his trunk or its contents, though he offer to swear that he has no means of proving those facts or either of them except by his own oath.

APPEAL from *Shipp, J.*, at Fall Term of MACON, 1863.

The plaintiff declared against the defendant as a common carrier for the loss of his trunk and its contents. It was admitted on the trial that the trunk was put into the charge of the defendant at Graham station, on the road where the plaintiff took the cars, and that the trunk was put on the train as the plaintiff's baggage, to be carried to Charlotte, a station on said road, that being the plaintiff's destination. The plaintiff tendered himself as a witness to prove by his own oath that the trunk was lost between Graham and Charlotte, and that he could not prove the loss otherwise, and also to prove the contents of his trunk, or for either of these purposes. The judge was of opinion that the plaintiff was not a competent witness in his own case, though he could not prove the loss of his trunk by other evidence than his own oath, and refused to permit him to be sworn and to testify in his own case. To which refusal the plaintiff excepted and submitted to a nonsuit.

Fowle and Phillips for plaintiff.
Moore and Merrimon for defendant.

BATTLE, J. The question on the record by the bill of excep- (203) tions is one of much practical importance in these days of increased and increasing traveling in stages, railroad cars, and other modes of conveyance. Though not a new question in some of the American States, it is now for the first time brought before us, and we must decide it upon the principles of evidence settled and established in this State.

It is an ancient and fundamental rule of evidence in the common law that *"nemo in propria causa, testis esse debet."* 1 Bl. Com., 443. Exceptions to this rule have, perhaps, always been admitted as to matters which are auxiliary to the trial, and which are in their nature preliminary to the principal subject of controversy, and are addressed to the court. Thus a party may make affidavit to the materiality of a witness; of diligent search made for a witness, or for a paper alleged to be lost; of his inability to attend; of the death of a subscribing witness; and cases of the like kind. 1 Greenleaf Ev., sec. 349. But upon the trial of

the merits of the cause, on an issue before the jury, the maxim that "no one is allowed to be a witness in his own cause" has come down to us from the earliest period of the common law, almost intact. The first innovation made upon it arose out of the Statute of Winchester, 13 Ed. I., ch. 1, commonly called the statute of "Hue and Cry," which gave to a party robbed an action on the case for damages against the hundred. In such action the plaintiff was allowed to be a witness on his own behalf to prove the loss. This testimony was said to have been admitted on the ground of necessity, and *Lord Kenyon,* in *Evans v. Williams,* 7 Term, 481, in a note, said that originally it was only in an action on that statute that it was admitted on such ground. It was, no doubt, thought, as the statute gave the action to the party robbed, and as he could very rarely prove his loss except by his own oath, a just and liberal construction of it gave him also the privilege of being a witness for
(204) himself. The change of the rule of evidence in cases of this kind may, therefore, very properly be considered as having been effected by statutory enactment, rather than by a deviation from it at common law. The breach in the integrity of the maxim being, however, once made, it was followed in course of time by at least one other innovation for which no statute can be held responsible. Thus, in 12 Vin. Abr., 24, Pl., 32, it is laid down that in a trial at Bodmyn, *coram Montague, Baron,* against a common carrier, a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness *ex necessitate rei.* These are the only cases which have been called to our attention as having been decided by the English common-law courts; and of these it may be remarked that one was a decision at *nisi prius* and the others were evidently the offspring of a statute. In some of the American States the decision made by *Baron Montague* has been adopted, and applied to the baggage of a traveler lost by the negligence of the carrier. (See *Pettigrew v. Barnum,* 11 Md., 434; *Johnstone v. Stone,* 11 Hump. (Tenn.), 419; *Herman v. Drinkwater,* 1 Green. (Me.), 27, while in one State at least it has been rejected. See *Snow v. R. R.,* 12 Met. (Mass.), 44.)

In North Carolina the common-law rules of evidence have been generally very strictly observed; and we are not aware that the maxim upon which we are commenting has been departed from as testimony intended for the jury, except in cases where the innovation has been introduced by statute. Thus, in what is generally known as the book-debt law, a party may prove by his own oath the items of his account to the amount of $60 only. Rev. Code, ch. 15. In cases of this kind there was a very strong necessity for the admission of such testimony, but the courts did not feel themselves at liberty to change the settled rule of evi-
(205) dence, and it remained unaltered until 1756, when the act en-

titled "An act to ascertain the method for proving book debts" was passed. (See Potter's Revisal, ch. 57.) In admitting the witness to testify for himself, it is worthy of remark that the act has carefully guarded the other party against the danger of a corrupt or perjured testimony. The account must be a book account; there must be no other means of proving the delivery of the articles than by the book and his oath; it must be for articles delivered within the last two years, and he must swear that the book contains "a true account of all the dealings, or the last settlement of accounts between them."

The necessity for admitting a plaintiff as a witness to prove the contents of his trunk, in an action against a railroad company or other common carrier for its loss, is not greater than it was in the case of a book debt; and as in the latter named case the courts felt themselves bound to leave it to the Legislature to supply a remedy for the mischief, so we must do in the case now before us. Our duty as a court is to ascertain, in each case that comes before us, what the law is, and then to decide accordingly; and if in the progress of society new circumstances or combinations of circumstances arise to which there is no principle of the common law applicable, we cannot assume the functions of legislators to devise one. That is the province of the Legislature, and we have neither the inclination nor the right to interfere with it.

The judgment of the court below must be

Affirmed.

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(206)

DAVID CLINE, EXECUTOR OF FRANK LATIMORE, v DANIEL LATIMORE AND JAMES C. LATIMORE.

(1 Winst., 207.)

1. Testator gave to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, says: "All of my property that is *not named*, both real and personal, is to be sold and, after paying all my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal." The reversion in the land devised to the wife for life falls into the residue and must be sold for an equal division.

2. No action can be sustained on a covenant made by one of the heirs who had received more than his share, to secure the excess so received by him until the reversion had been sold.

THIS was an action of covenant brought on the following deed:

Know all men by these presents, that we, Daniel Latimore as principal and James C. Latimore and John Latimore as securities, promise to pay

David Cline, executor of Frank Latimore, deceased, such sum as may be due from the said Daniel Latimore to make the other heirs equal with the said Daniel in the amount due each one from the estate of Frank Latimore, deceased. Witness, etc.

D. LATIMORE, [L. S.]
JAMES C. LATIMORE, [L. S.]
JOHN LATIMORE. [L. S.]

Frank Latimore by his will gave to his widow, who was alive at the time of the trial, a tract of land during her life, worth at the testator's death $2,000 or $3,000. The will contains this clause: "My eldest son Daniel I have given 223 acres of land on Knobb Creek, which was worth $600, and other property worth $85, and also a negro boy named Anthony (provided he will refund back sufficient to make the rest of the heirs equal to himself), which boy was worth $850." The testator had many children, to some of whom he declares in his will he had made advancements of a certain value; and the dispositive part of his
(207) will concludes as follows: "My daughter Susan I have given her her full share of all that I intend for her to have out of my estate. All my property that is not named, both real and personal, is to be sold, and, after paying my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal, Susan excepted." The testator's estate, exclusive of the land devised to his widow for life, and including the property given to his children other than Susan, was worth $8,000, and Daniel had received more than his share by $900. The reversion of the land given to the widow for life had not been sold.

The defendant moved to nonsuit the plaintiff, because he had brought suit before he had sold the reversion in the land devised to the widow. The judge reserved the question of law, by consent of parties, with leave to enter a nonsuit if he should be of opinion with the defendant. The jury returned a verdict in favor of the plaintiff. The judge being of opinion with the defendant on the question of law reserved, ordered the verdict to be set aside and a nonsuit to be entered, from which judgment the plaintiff appealed.

No counsel for plaintiff in this Court.
Phillips for defendant.

MANLY, J. We concur with the court below in awarding a judgment of nonsuit.

The reversion in the parcel of land devised to the wife for life was a part of the testator's estate undisposed of specifically, and which fell therefore into the residue.

This executor is required to sell and divide among the heirs, so as to equalize shares. It must be converted into cash, and applied as the will directs; in other words, the will must be fully executed before the sum secured by the covenant can be ascertained or considered due. The action was therefore premature.

The judgment of nonsuit is (208)

Affirmed.

DOE ON THE SEVERAL DEMISES OF HUGH N. REEVES AND WILLIAM CURRIE v. JAMES H. CRAIG.

(1 Winst., 209.)

A devise of a tract of land to the son of the testator, "if he be living and returns to the county of Orange," is a gift of the land on condition that the son returns to Orange as his domicile, especially when other provisions of the will seem to show the testator's expectation and desire that the son should reside there after testator's decease.

EJECTMENT, tried before *Gilliam, J.*, at Spring Term of ORANGE, 1864.

Hugh Currie of Orange County made his will in 1849, whereby he devised as follows: "I give and devise to my son William Curtis, if he be living and returns to the county of Orange, the plantation whereon I now live, containing, etc.; but if my son is dead or does not return to the county of Orange, I give and devise to my grandchildren, Mary Currie, Betsy Currie," etc. The said grandchildren were the children of William. By another clause of his will the testator directed his slaves to be sold, and gave one-third part of the price to the children of his son William. The testator died in 1851, and his will was proved in that year. William Currie had been absent from this State for several years before 1849, and did not return to this State until in the year 1860, when he came to Orange County for the purpose, as he said, of disposing of his land. He made a deed of bargain and sale for the land to Hugh C. Reeves, one of the lessors of the plaintiff, and, after remaining in Orange County about three weeks, left the State and has not returned to it since. The testator's grandchildren above named had always resided in Orange County. The defendant in the (209) action claimed under them. The jury found a special verdict to the effect above stated, and the judge being of opinion with the plaintiff, a verdict was entered accordingly and judgment rendered thereon, from which the defendant appealed.

Graham for plaintiff.
Phillips for defendant.

MANLY, J. The case depends upon the construction of the devise to William Currie; and the question is, What is the true meaning and intent of the condition upon which his taking the estate is made to depend?

We are satisfied the *return to the county* of his son which the testator had in his mind was a return *as a resident;* otherwise, it is difficult to conceive why he should have stipulated for a return at all. If he had meant it as a personal advancement, it would have been more germane to his object to have given it absolutely upon the condition of his surviving him.

The main object of the testator seems to have been to make provision for his son's family. This he desired to do through his son, for reasons of mutual benefit; and therefore he stipulated for his return to the county—for his return to it as his domicile, whereby his children would become subject to his care, and he be in a condition to attend to their education and maintenance. It could not have entered into his contemplation that his son might come into the county, make sale of his estate, and then return with the proceeds to his former retreat. Such a return would not at all advance what we have supposed to be the principal object of the testator.

In further support of the view we have taken, it may be remarked
(210) that the testator in making provision for this branch of his family gives the land to the son and the personalty to his children, suggesting by this arrangement an expectation and desire that there should be a common possession and enjoyment.

The question as to the time within which the condition should be performed we have thought it unnecessary to consider. Our opinions upon the first point dispose of the case, and we decline going into the other.

The judgment of the Superior Court should be reversed and a judgment entered for the defendant.

Reversed.

Cited and distinguished: Harris v. Hearne, post, 484.

W. W. HIGDON AND OTHERS v. E. C. CHASTAINE.

(1 Winst., 212.)

1. If the general issue be pleaded together with special pleas, and the jury find all the issues in favor of the defendant, the Supreme Court cannot reverse the judgment of error in the charge of the judge respecting the matter of the special pleas.

2. It cannot be assigned for error that the judge did not charge the jury on a point which the party did not make at the trial.

ACTION of debt, tried before *Shipp, J.*, at Fall Term of MACON, 1863.

The declaration was for $500 claimed by the plaintiff to be due to him by virtue of a deed executed by the defendants, the contents of which it is unnecessary to state, as its construction is not brought into question. The defendants pleaded the general issue, conditions performed, and no breach. The plaintiffs assigned two breaches: (1) That the defendant had discovered a valuable copper mine, and sold it before 25 December, 1859. (2) That he was satisfied that it was proved to be a valuable copper mine: in either of which cases they insisted that the (211) defendant was bound to pay the sum of $500.

The subscribing witness was introduced and proved the execution of the instrument declared on. Mr. Cannon was introduced as a witness by the plaintiffs, who testified that he went with plaintiff Higdon to the defendant Chastaine, before the bringing of this suit, and demanded the $500 or a surrender of plaintiff's lease, offering to settle and pay the defendant's expenses. The defendant refused to pay the $500, but said he would pay if he could sell the mine for $10,000, and that he could not surrender the lease, because there was some sort of contract upon the mine. This evidence was objected to by the defendant, but admitted by the court. The defendant's counsel moved to nonsuit the plaintiffs, which motion was overruled. The cause was submitted to the jury upon this testimony, and the counsel for the plaintiffs insisted that the testimony proved a breach of one or the other of the conditions mentioned in the agreement, and pressed his right to recover upon this ground alone. The court charged the jury that if the testimony of the witness Cannon satisfied them that the defendant had committed either of the breaches of the agreement assigned by the plaintiffs, viz., if the proof satisfied their minds that the defendant had discovered a valuable copper mine and sold it as such, or that he was satisfied that it was proved to be a valuable mine as contemplated in the agreement, the plaintiffs were entitled to their verdict of $500 and interest; and if they were not satisfied of these facts, the defendant was entitled to their verdict.

There was no exception to the charge. There was a verdict in general terms for the defendant. Rule for a new trial. Rule discharged, and the plaintiffs appealed to the Supreme Court.

(212) *Merrimon for plaintiffs.*
No counsel for defendant.

BATTLE, J. This was an action of debt in which the plaintiffs declared upon a sealed instrument, and assigned breaches of the conditions annexed to it. The defendant pleaded the general issue and conditions performed and not broken. Upon the trial, the jury found a verdict for the defendant; and it is stated in the case that there was no exception taken to the charge of the court to the jury. Yet there was a motion for a new trial, which being refused, and a judgment rendered for the defendant, the plaintiff appealed.

We cannot discover any error which we are at liberty to redress. The plea of the general issue made it necessary for the plaintiffs to prove the execution of the instrument declared on, and they introduced and examined the subscribing witness, who testified that it was duly executed: and they also offered evidence for the purpose of proving the breaches assigned. It does not appear that any testimony was introduced on the part of the defendant. The court charged the jury upon the bearings of the evidence, and no objection was made to the charge. The jury returned a verdict generally "for the defendant," which of course negatives the execution of the instrument upon which the suit was brought. Upon this state of the record it is out of our power to notice any improper instructions upon the evidence given in relation to the breaches, even if there were any such; for if the execution of the instrument were not established, what was said about its breaches must have been irrelevant.

It has been repeatedly decided in this Court that in an action of assumpsit, if the defendant plead the general issue and the statute of limitations, and the jury find "all the issues for the defendant," the court cannot inquire into the correctness of the charge in rela-
(213) tion to the issue on the latter plea. *Morisey v. Bunting,* 12 N. C., 3; *Mastin v. Waugh,* 19 N. C., 517; *Cole v. Cole,* 23 N. C., 460. The present appears a parallel case, and must receive the same determination.

But it is said in the argument here that the plaintiffs were not bound to assign breaches of the bond, and to offer proof in support of them, and that upon the testimony offered by them to establish the execution of the instrument sued on, the court ought to have told the jury that if they believed the testimony the plaintiffs were entitled to recover. The

reply is, that the court was not bound to instruct the counsel for the plaintiffs in the management of their case; and it was not error of which they have a right to complain that he did not charge the jury upon a point which they did not think proper to take. They made no objections to his instructions upon the questions which they presented, and after a verdict generally in favor of the defendant, they are estopped from making exceptions founded on their own mismanagement.

No error.

Cited: Thornburgh v. Mastin, 93 N. C., 263.

JARMAN G. JOHNSON v. ELI OLIVE.

(1 Winst., 215.)

1. An indorsement of a bond by the obligee in this form, "A B, for sixty days, 19 November, 1858," imposes no liability on the indorser after the expiration of the limited time.

2. A justice of the peace has no jurisdiction of a guaranty.

APPEAL from a justice of the peace, tried before *Heath, J.,* at Fall Term of JOHNSTON, 1860.

The defendant was the obligee of a bond executed by one (214) Moore. He indorsed it to the plaintiff by writing these words on the back: "Eli Olive, for sixty days, 19 November, 1858." The warrant was brought on 25 December, 1859, a demand having been made on defendant a few days before. No evidence was offered of any communication between the parties concerning the import of the indorsement, or of any consideration other than what is implied by the indorsement. A verdict was taken for the plaintiff, subject to the opinion of the court, and the judge being of opinion with the defendant on the question of law reserved, the verdict was set aside and the plaintiff nonsuited. From this judgment the plaintiff appealed.

Winston, Sr., for plaintiff.
No counsel for defendant.

MANLY, J. The judgment of the Superior Court appears to us to be correct.

We take the indorsement, upon which the action is brought, to be susceptible of but two interpretations. It is either an indorsement importing an unconditional promise, but to continue in force for a limited term only, or it is a conditional promise, *i. e.*, a guaranty of the debt for the time limited. If it be the first, the time having been permitted to elapse, the responsibility ceases, and the right of action is gone. If the second, the right of action is not only gone by the lapse of time, but the justice before whom the action was commenced had no jurisdiction of it; and the want of jurisdiction being patent on the face of the pleading, the suit may be dismissed on motion.

Affirmed.

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(215)

WILLIAM J. BINGHAM AND OTHERS v. PHARAOH RICHARDSON.

(1 Winst., 217.)

1. Where the proprietors and managers of a school, on being applied to by a parent to receive his sons as scholars, inform him of their willingness to receive them, and send him a statement of their terms, one of which is, "when a place is engaged, the session's charge is considered due, unless the boy be prevented from coming by act of God," and the parent by letter expresses his acceptance of the terms, though he does not send his sons to the school, he is liable to pay for a session's board and tuition, the proprietors proving their ability and willingness to comply with the contract on their part.

2. If there be only one event on which money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is competent for the parties to fix a given amount of compensation in order to avoid the difficulty.

ACTION of *assumpsit,* tried before *Heath, J.,* at September Term, 1863, of ORANGE.

The case is stated in the opinion of the Court.

Phillips for plaintiff.
No counsel for defendant.

MANLY, J. Upon the trial of this case, in Orange Superior Court, there seems to have been no dispute as to this state of facts:

The plaintiffs are proprietors and managers of a select school in the county of Orange, for the government of which they have adopted various regulations, and among them the following:

(14) "Charge per session, $125 in advance, which covers board and tuition, bed and bedding, fuel and washing.

(15) "When the place is engaged, the session's charge is considered due, unless the boy be prevented from coming by the act of God. Notice of continuance or withdrawal to be given a month, at least, before the end of the session."

The defendant applied for the admission of three of his sons (216) into this school, and after receiving a favorable answer and a copy of the regulations, from which the foregoing was extracted, he wrote to the principal of the school as follows: "Your communication to Mr. Saunders was handed me this morning. I gladly avail myself of the opportunity of handing my boys over to you, hoping that you may not be disappointed in them."

The boys were not sent to the school of the plaintiffs, but to another school in the same county, without notice to plaintiffs.

The plaintiffs averred and proved a readiness on their part at all times to fulfill their undertaking.

The counsel for the defendant, upon this state of facts, contended that inasmuch as the boys were not actually entered at the school, by being sent there, the contract on the part of the defendant was not complete. The counsel, however, consented that the jury might find a certain amount of damages, subject to the opinion of the court upon the point of law raised by him.

The court gave judgment for the plaintiffs and the defendant appealed. We are of opinion the court properly interpreted the negotiations between the parties.

The school is a select school; application is made for the admission of three boys; the managers engage to receive them, and announce at the same time that when a place is engaged, the session's charge is considered due; and the defendant then writes: "I gladly avail myself of the opportunity of handing my boys over to you, hoping that you will not be disappointed in them."

This certainly imports an engagement on the one hand to take charge of the boys, and a promise on the other to send them. There were mutual obligations, for the violation of which one or the other, as the case might be, would have legal cause of complaint.

The record does not seem to raise another question which was (217) discussed in this Court, viz., whether the sum of $125 was a penalty or liquidated damages. According to the view we take of it, no such question can well be made. By the terms of the contract, the semi-annual charge of $125 for each pupil is to be paid in advance, and was due at the time the places were engaged. It was a demand presently due, and could be recovered forthwith, whether the boys were ultimately sent or not.

Regarding it in the light of a mere security for the performance of the contract, it seems to us very clearly to be of the nature of liquidated damages. We entertain no doubt of the principle that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty. The case supposed is before us, and the *difficulty* has been guarded against as clearly as words can serve to do so. So *quacumque via data,* the recovery made below is correct.

Affirmed.

Cited: Horner School v. Wescott, 124 N. C., 520; *Teeter v. Military School,* 165 N. C., 571.

DUNCAN MURCHISON AND OTHERS v. HECTOR MCNEILL.

(1 Winst., 220.)

1. **Clause 19, section 86, schedule B, of the act of the General Assembly of 1862-3, imposing a tax of all the net profits above 75 per cent on the cost of production on every person or corporation manufacturing cotton or woolen cloth, etc., is constitutional, but does not apply to profits already made when the law went into effect.**

2. **Such tax is not a capitation or poll tax.**

(218) ASSUMPSIT for money had and received, tried before *Osborne, J.,* at Fall Term, 1863, of CUMBERLAND, on the general issue.

It appeared that the plaintiffs were manufacturers of cotton goods, in Cumberland County, and had made a profit of $1,500 over 75 per cent on the cost of production upon yarns and cloth which they had manufactured before the ratification of the act of 1862-3, entitled "Revenue," and between 1 January, 1863, and the date of its ratification. The plaintiffs paid the money under protest to the defendant, the sheriff of Cumberland County, who demanded payment under the penalty of the act. The plaintiffs gave notice to the defendant at the time of paying the money that they would sue to recover it back, as money paid by compulsion, without authority of law.

The jury, under the direction of the judge, found a verdict for the defendant. The plaintiff excepted to the direction of the court, and from the judgment on the verdict appealed to this Court.

Moore for the plaintiffs.
Buxton for the defendant.

BATTLE, J. The General Assembly, by an act which went into effect 11 February, 1863, imposed a tax of all the net profits above 75 per cent upon the cost of production on every person or corporation manufacturing cotton or woolen cloth, or a mixture of both, from and after the first day of January of the same year. The plaintiffs were manufacturers of cotton cloth on 1 January, 1863, and continued to be so during that year, and having, as they admitted, made a profit of $1,500 in their business, between 1 January and 11 February, they paid the same to the sheriff under protest, and brought this action to recover it back.

In the argument here the counsel for the plaintiff contends that the Legislature had no power to impose a tax upon the past profits of the plaintiff's business. He insists that the tax is in effect a capitation tax, and as such is imposed contrary to the Ordinance of the Convention of 1861, entitled "An ordinance in relation to taxation." That ordinance provides, "that all free males, over the age of 21 years and under the age of 45 years, shall be subject to a capitation tax not less than the tax laid on land of the value of $300, and no other free person shall be liable to such taxation; and also land and slaves shall be taxed (223) according to their value, and the tax on slaves shall be as much but not more than that on land, according to their respective values; but the tax on slaves may be laid on their general average value in the State, or on their value in classes in respect to age, sex, and other distinctive properties, in the discretion of the General Assembly, and the value be assessed in such modes as may be prescribed by law." It is manifest that if the tax to which the plaintiffs object be a capitation tax, it is not assessed in accordance with the provisions of this ordinance, and the act imposing it is in violation of the fundamental laws of the State, and is therefore void. The question then is, Can the tax be deemed a capitation or poll tax? The counsel insists that it is, for the following reasons: A tax, he says, on the land, franchises, slaves, or other personal chattels and choses in action which a man now owns is a tax on his property, and is a legitimate impost upon him. So he may be rightfully taxed on the profits of his business, profession, or trade, or for a license to follow any particular business, profession, or trade. But a tax on any article of property, which he formerly owned, but which he has heretofore consumed, lost, or destroyed; or upon the profits of a business, profession, or trade which he followed, or in which he was engaged, in bygone times, which profits he has consumed, lost, destroyed, or converted into some other kind of property; or upon a license heretofore granted to pursue a business, profession, or trade which he has ceased to follow or be engaged in, cannot be called a tax on property, profits, or licenses, because when it is imposed the subjects of it have no existence. Being past and gone, they are to be considered as if they

never had been. Such a tax, then, can be only upon the person. It is to all intents and purposes nothing more nor less than a capita-
(224) tion or poll tax. This is a succinct statement of the argument of the plaintiff's counsel, presented by him, however, in a variety of views, and with many ingenious illustrations. Of its force and conclusiveness we do not feel ourselves called upon to judge, because we do not think it applies to the law in question, as we shall now endeavor to show.

The act required that the manufacturers of cotton cloth, who carried on their business from and after 1 January, 1863, should pay annually a certain tax upon their profits. It was well known to those who passed the act that such manufacturers did not, and from the nature of their business could not, ascertain and declare a dividend of profits, either daily, weekly, or monthly. Hands had to be employed, raw materials purchased, and a great many things done before sales could be made and accounts stated so as to show what the profits were. It was well known, too, to the Legislature that partnerships and corporations were in the habit of declaring dividends at certain stated periods, usually annually or semiannually, but never as frequently as monthly or even quarterly. It was further known that winter was mainly the time for preparing the ensuing year's work, by hiring workmen, purchasing supplies, etc., and hence was the time for expenses rather than profits, for the latter were to be realized afterwards. Hence, there could be no profits, properly speaking, for the first month or two of the year, and when they did accrue, the law would be in force and would apply to them as present and accruing, and not past profits. It certainly can be no objection to the validity of the act that the work and materials which were to produce the profits after its ratification were in existence prior to that time.

But it may be said that the bill of exceptions states as a fact that a certain sum was realized as profits between 1 January, 1863, and
(225) 11 February of the same year, when the act was ratified, and that we must take the fact to be so, without inquiring as to how it was ascertained. A sufficient reply, we think, is this: that the law directed the tax upon the profits to be paid annually, and clearly means such profits as are ascertained in the usual way and at the usual stated periods. If the plaintiffs kept their books so as to have a balance sheet of profits and loss struck *de die in diem,* or from week to week, or month to month, it ought to have been so stated in the case; for we know that such a course, in business of the kind in which they were engaged, is not common, even if it be possible. They certainly had no right to do what we suspect they did—that is, make out the account of profits at the end of a half year, and then calculate the average per month or week. Profits have never in fact been realized in such way; and the Legisla-

ture never intended that they should be ascertained by such a mode of calculation.

Our conclusion, then, is that the act of the Legislature in question did not apply to profits past and gone, but to profits then in the process of being made, and which were in fact ascertained and declared after the law went into effect, and that consequently the act is constitutional and valid.

Affirmed.

Approved: S. v. Bell, 61 N. C., 86; *Huggins v. Hinson, id.,* 128.

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(226)

THE STATE v. JOHN HARWOOD.

(1 Winst., 228.)

It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses upon whose testimony the indictment was found were sworn before they were sent to the grand jury.

THE prisoner was indicted in WAKE, and the case was removed to JOHNSTON, where it was tried at Spring Term, 1864, before *Heath, J.*

The transcript of the record from the Superior Court of Wake sets out the holding of the Superior Court on the first Monday after the fourth Monday of September, A. D. 1862, the return of the venire by the sheriff, and the names of the jurors, and proceeds in these words: "And thereupon, by the oath of Thomas Whitaker, foreman, John Adams, etc., good and lawful men of the county aforesaid, then and there drawn from the said venire and then and there impaneled, sworn, and charged to inquire for the State of and concerning all crimes and offenses committed within the body of the said county, it is presented in manner and form following, that is to say, the jurors for the State, upon their oath, present that John Harwood, late of Wake County," etc., charging him in the usual form with the murder of John C. Kennedy, and the transcript sets out his arraignment and plea of not guilty.

On his trial one Patrick, a witness for the State, swore that on the day of the homicide, 12 December, 1861, Kennedy, the deceased, and Harwood, the prisoner, were at his house in the county of Wake. The deceased and the prisoner drank together several times and seemed perfectly friendly; both started out of the house, prisoner going (227) first and the deceased following him in about a minute and a half. The prisoner went down the steps and passed to the corner of the piazza and stopped. The deceased went down the steps, and about the time he

might have got to the lower portion of the steps, the prisoner, who had his gun in his hand, raised his gun, put his eye to it and fired quickly, and the deceased fell from the steps. The prisoner said nothing before he fired. The witness could distinctly see the prisoner all the time, but could not see deceased after he fell. The witness went out of the house and found deceased on the ground shot in the breast; he lived but a few moments. The witness asked the prisoner why he killed Kennedy (the deceased). The prisoner made no answer, and left in four or five minutes after the killing.

Miss Patrick, a witness for the State, swore she was present at her father's house on the day of the homicide. She saw the prisoner standing at the corner of the piazza with his gun, and heard him say to the deceased, "If you put your foot in this yard, I will put this load in you." He then fired. The deceased made no answer to the prisoner's threat, and she saw no more of the prisoner that day. She saw no arms in possession of the deceased. On cross-examination, this witness swore that prisoner came out of the house in a hurry with his gun on his arm. Deceased came out slowly. Prisoner (who is a Texas man) had been at her father's for some time previous to the homicide, but witness neither saw nor heard any disturbance, nor anything unfriendly between them. In passing out of the house and towards the eastern end of the piazza the prisoner was going towards home.

Mrs. Patrick, also a witness for the State, swore that she was the wife of the first witness, and was at the house on the day of the homicide, and saw the transaction through a glass window in the kitchen; de-
(228) ceased went out of the house first, and prisoner passed him with his gun on his arm; as prisoner passed out he said to deceased, "If you come out I will shoot you"; he then shot deceased, who fell and drew only one breath and died. In a minute prisoner was gone. On cross-examination, she swore that prisoner passed out of the house and down the steps rapidly; that as he passed deceased he looked at deceased, but deceased did not look at him, and that, as prisoner spoke to deceased, deceased turned towards prisoner and prisoner discharged his gun at him.

One Stancell, a witness also for the State, swore that within an hour after the homicide, prisoner came to him and asked him to lend him his repeater; he said he wanted it, for he had killed a man and was compelled to go away. Witness asked, "Whom have you killed?" Prisoner answered, "I have killed Kennedy." Witness asked, "Why did you kill him?" Prisoner answered, "Kennedy said if I went out he would kill me, G—d damn me, and he came out and I slammed eight buck shot into him."

One Hinton stated that he examined the deceased immediately after his death, and that the load passed nearly through his body.

The before named are the witnesses examined for the State. No point was made either in the examination of the witnesses or in the prisoner's counsel's address to the jury as to the mode or immediate cause of the death of the deceased, or as to time or place.

The defendant's counsel in his statement of the grounds of defense said he should contend, first, that the prisoner was guilty of no offense, because the act of killing was committed under a temporary or permanent insanity; or, if otherwise, was excusable in necessary self-defense.

Secondly, that the prisoner was guilty of manslaughter only, as there was no malice. (229)

He introduced many witnesses who swore to the prisoner's previous good character; some of whom swore to the insanity of the prisoner's ancestry, and others swore that they knew him when a boy, and that his mind was not good; he could not learn anything and therefore they thought his mind was unsound.

The judge instructed the jury that if a killing takes place, nothing more appearing, the law implies malice, and the killing would be murder, and that in this case there was evidence of malice to go to the jury, to be weighed and passed upon by them, and if they believed there was malice, it was a case of murder; that evidence of the prisoner's character was permitted to be introduced, not to screen a guilty man because of his previous good character, but to satisfy the jury that notwithstanding the evidence in the cause, the prisoner is not guilty; and that in this case, if the evidence of good character overcame the other evidence against the prisoner, and satisfied them it was not true, then they ought to find him not guilty. That it was not every degree of insanity that would excuse homicide; that if a man knows what he is doing, and at the same time knows that he is doing wrong, he is responsible for his acts. But if he does not know what he is doing, or, knowing what he is doing, he does not know that he is doing wrong, then he would not be responsible. And further, that the law does not recognize irresistible impulses as excuses for criminal acts, which the mind of the actor recognizes as wrong; that in this case, if the prisoner was insane to the extent above stated, then he would not be guilty; and this was equally true whether the insanity was temporary—existing at the time of the act done—or permanent.

The judge further charged the jury that there was no evidence (230) tending to show that the killing was in necessary self-defense; that if the prisoner had cause to believe, and did believe, that the deceased intended to kill him, and the prisoner killed deceased *simply* because of such belief, the killing would be murder. In order to excuse or

mitigate the killing, the deceased must have been in a condition, actual or apparent, to kill the prisoner; that if the prisoner had good cause to believe, and did believe, that the deceased intended to kill him, and the deceased was in apparent condition to execute such intention, and the prisoner killed the deceased when the prisoner might have retreated, without danger of death or other great bodily harm, then the prisoner would be guilty of manslaughter at least.

The jury found the prisoner guilty of murder.

There was a motion in arrest of judgment: (1) Because the record does not show that the indictment was found a true bill by the grand jury. (2) The record does not show that the witnesses on whose testimony the indictment was found were sworn before they were sent to the grand jury.

The motion was overruled, and judgment was rendered according to the verdict.

No counsel for the State.
Winston, Sr., for the prisoner.

MANLY, J. The case in the court below seems to be set forth in the record with particularity. The evidence, as well as the charge of the presiding judge, seems to be full and complete.

We have examined these in connection with each other, and are of opinion that the charge is applicable and responsive to every view
(231) which can properly be taken of the evidence, and that the prisoner has no cause of complaint.

We have had no particular part of the charge called to our attention by way of exception, and suppose there is none in the view of prisoner's counsel that affords ground for such criticism.

The principles propounded to the jury in the court below, whether they relate to the grades of homicide or the question of insanity, have been so frequently discussed in this Court down to a recent period that we deem it unnecessary to repeat them now. They consist with what we regard as the settled and established law of the land.

The grounds taken in arrest of judgment are not tenable. These are also settled against the prisoner by recent adjudications in this Court. *S. v. Guilford,* 49 N. C., 83; *S. v. Roberts,* 19 N. C., 540; *S. v. Barnes,* 52 N. C., 20.

The record upon which the judgment below was pronounced, as stated by the court, follows the precedent in the Appendix to 4 Black. Com. This has been adopted by Mr. Eaton in his book of Forms, and approved in this Court in *S. v. Guilford, supra.*

The prisoner was tried for a homicide which, for aught that appears, was unprovoked and wanton. He has had the benefit of every proper safeguard afforded by the courts under the rules of law, and the record sent to this Court seems to be free from defects.

No error.

Cited: S. v. Lanier, 90 N. C., 716; *S. v. McBroom,* 127 N. C., 530, 535; *S. v. Sultan,* 142 N. C., 573.

(232)

THE STATE v. JAMES C. McNEELEY.

(1 Winst., 334.)

1. One who has been licensed to retail spirits may lawfully employ an agent to conduct that business for him, although he leaves the country for an indefinite time, as, in this case, in the military service of the Confederate States for three years, or the war.

2. It *seems* he cannot assign his license.

INDICTMENT tried at Fall Term of BURKE, 1863, before *Howard, J.*

The defendant was indicted for selling spirituous liquors by the small measure without license. (See Rev. Code, ch. 34, s. 94, and ch. 79, s. 6.) He admitted retailing in November, 1862, and produced, in justification of his doing so, a license to retail from the sheriff of Burke to one W. C. Good, from February, 1862, to February, 1863, and a paper-writing from Good to himself in words and figures as follows, viz.:

Know all men by these presents, that I, W. C. Good, have employed J. C. McNeeley to act for me in my absence, and to manage my grocery store, and to retail spirituous liquors for me in the town of Morganton, and, if he prefers doing so, he may have the one-half of the profits, instead of the salary, I have promised him. Given under my hand and seal this 1 October, 1862. W. C. GOOD. [L. S.]

It was proved that at the date of this instrument Good was taken into the army as a conscript, where he has remained all the time since, and that the instrument was executed for the purpose of continuing his business in Morganton.

The court charged the jury that the business of retailing must be under the control and supervision of the person licensed, and that he had no right to delegate another to retail in his stead during such an absence as that of a soldier enlisted for three years or the war. (233)

The defendant excepted to the instruction. Verdict of guilty, and judgment.

Winston, Sr., for the State.
No counsel for defendant.

BATTLE, J. The decision of this case depends upon the question whether the defendant, when he committed the act of retailing, was the assignee of W. C. Good, or was merely his agent or manager. If he were the assignee, we expressed the opinion *arguendo* in *S. v. Gerhardt,* 48 N. C., 178, that he could not sell spirituous liquors by the small measure under the license of his assignor, because his moral qualifications had not been examined into and approved by the county court, as required by law. We can see no reason why a licensed retailer may not have a clerk or agent to assist him in his business, he himself remaining liable for the acts and contracts of such clerk or agent, done or made within the scope of his employment. It is a matter of public notoriety that much of the trading with slaves is done in grocery and other stores, and the Rev. Code, ch. 34, sec. 90, evidently contemplates that the owners of such stores may have agents or managers, because it makes certain provisions in relation to them as such. The keepers of groceries are frequently licensed retailers also, and we have never understood that they cannot have clerks, agents, or managers in the latter, as well as in their other business. W. C. Good had applied for and obtained a license to retail spirits in the town of Morganton for one year. He had paid the State for a valuable privilege, which he was clearly entitled to enjoy for the specified time, unless he should forfeit it by a *misuser.* Before the expiration of his time he was conscripted and carried off into the military service of his country. He could no longer enjoy his privi-
(234) lege in person, and he could not assign it. Why could he not employ another person to manage the business for him? He would still remain responsible for the good conduct of his agent; and that, it seems to us, makes a difference between such a case and that of an assignee.

The instrument offered in evidence by the defendant showed clearly that he was acting only as agent, and not as assignee. If, indeed, the transaction between the parties was really intended as a sale of the privilege, instead of the appointment of an agent, then it was an attempted fraud, and afforded no protection to the defendant. But the case was not presented to the jury in that view, and the conviction cannot, therefore, be sustained on that ground.

Error.

Cited: S. v. Kittelle, 110 N. C., 565, 568, 588.

SARAH WOODFORD v. LUTHER HIGLY AND WIFE.

(1 Winst., 237.)

A conveyance of land to a man and his wife and their heirs vests the entirety in each of them, and upon the death of one of them the survivor takes the whole in severalty.

PETITION for dower, tried before *Heath, J.*, at Fall Term of LINCOLN, 1863.

In 1822 John Boyd conveyed the land in which dower is demanded to Lyman Woodford and his wife, Jane (she being the daughter of Boyd), and their heirs, and to them after the death of the grantor and his wife. John Boyd and his wife died in the lifetime of Woodford and his wife. Then Mrs. Woodford died, and Woodford married the (235) petitioner and died.

The judge below decided that the petitioner was entitled to dower in the whole of the land.

Fowle for petitioner.
No counsel for defendant.

MANLY, J. The judgment of the court below is in conformity with the decision of this Court in *Motley v. Whitmore,* 19 N. C., 537, and is certainly correct. The contrary view arises, we suppose, from a misapplication to the case of the statute in relation to estates held in joint tenancy, Rev. Code, ch. 43, s. 2, where it is declared that in cases of estate held in joint tenancy the part or share of a tenant dying shall not go to the surviving tenant, but to the heir of the deceased.

Lyman Woodford and his wife, Jane, were not joint tenants, and neither had a *part or share* to go to the heir or assignee of the one dying first. When land is conveyed to a husband and wife, they hold by entireties. "Being in law but one person, they have each the whole estate as one person, and on the death of either of them the whole estate continues in the survivor."

This has been long established as the rule governing cases of this kind, as will be seen by reference to the authorities cited in *Motley v. Whitmore.*

Affirmed.

Cited: Hancock v. Wooten, 107 N. C., 15; *Harrison v. Ray,* 108 N. C., 216; *Stamper v. Stamper,* 121 N. C., 254; *Ray v. Long,* 132 N. C., 896.

THE STATE v. JOHN JOHNSON.

(1 Winst., 238.)

Property proved to have been stolen, found six weeks after the theft in a house occupied exclusively by the defendant and his wife, is found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt.

(236) THE defendant was indicted for stealing cotton cloth from the storehouse of the prosecutor. The goods had been stolen about six weeks when they were found in a house rented by the defendant, in which he and his wife and no other person lived. The defendant stayed at a store adjacent to that of the prosecutor, and there was an opening in the partition wall between the two stores, through which a man might pass from one to the other. The prosecutor lost many other articles besides the cloth, some of which were men's wearing apparel. One of these garments had been stolen a short time before the finding of the cotton cloth, and was found in the defendant's house at the same time. The cotton cloth was identified by the prosecutor by a mark upon it in the course of business.

The court charged the jury that the goods, being found in the house of the defendant, were presumed to be in his possession; but, owing to the length of time which had elapsed from the stealing of the goods until the discovery of them in the possession of the defendant, no presumption could arise that he had stolen them; but the fact of his having them in possession was evidence which they would consider with the other evidence in the cause in determining his guilt or innocence. Verdict guilty, and judgment accordingly.

Winston, Sr., for the State.
No counsel for defendant.

MANLY, J. We are informed that the proofs in this cause establish as a fact the finding of the stolen property in the house of the defendant, where he and his wife alone resided, and the exception to the (237) charge of the judge is that he regarded this as a possession by the defendant, and authorized the jury so to assume.

We do not think this is erroneous. The sense of the term possession in this connection is not necessarily limited to custody about the person. It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn, when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or with his undoubted concurrence. See *S. v. Williams,* 47 N. C., 194, and cases referred to in Waterman's notes to 2 Archbold's Criminal Pr. and Pl., 369.

We think the case before us falls within the scope of the decided cases, and that it is proper to hold one responsible as the possessor of property, when it is found in his dwelling house under the circumstances stated in this case. It consists with reason, policy, and the just rights of persons to hold as a legal presumption that the property must have been put there by his act or his concurrence.

This disposes of the only exception which appears upon the record, and there is nothing in other portions of the judge's charge of which the defendant can properly complain. It is clearly in accordance with well settled principles of evidence. Possession of stolen property, although not so recent as to raise a legal presumption of the taking, is nevertheless evidence to be considered in connection with other evidence upon that point. It is of very frequent occurrence on the circuits that a part of the evidence in cases of larceny consists of proof that the stolen property was found in the house of the accused, either before or after his apprehension, and question has rarely been made in our courts, so far as I am aware, of its competency. At any rate, it is now settled to be admissible, be the time longer or shorter, and however insufficient it may be *"per se"* after a considerable lapse of time. Such a pos- (238) session, of course, is more or less cogent, according to the lapse of time, the nature of the house, and the condition of the household, the manner of keeping the lost property, proximity to the place of taking, the probability or improbability of representations to account for the possession, the character of the accused, and the like. Such matters of proof might give significance to a possession, which would be of itself of slight import; and all such evidence is, therefore, competent, and may be sufficient to satisfy a jury of the felonious taking by the person who is fixed with the possession. There was evidence of this character in the cause. It appears to have been fairly laid before the jury, according to the view here taken, and the jury have come to a conclusion with which we have no right to interfere, if we had the inclination.

PER CURIAM. No error.

Cited: S. v. Brown, 76 N. C., 226; *S. v. Rights,* 82 N. C., 678.

THE STATE v. GREEN DRAKE AND OTHERS.

(1 Winst., 241.)

If three men break open the prosecutor's crib and take and carry his corn therefrom, his son being present and forbidding them, they are guilty of an indictable trespass, and the taking may be averred to be from the possession of the prosecutor.

INDICTMENT against three persons for a forcible trespass in taking and carrying away the plaintiff's corn, tried before *Osborne, J.,* at Spring Term, 1864, of DAVIE.

(239) The indictment charged "that William F. Miller, of, etc., was lawfully possessed of a certain quantity of corn, etc., and Green Drake, N. H. C. Williams, and Samuel Howard, with force and arms and strong hand, etc., did seize and take from the actual possession of the said William F. Miller, he being present and forbidding the same, by his son and agent, William H. Miller, the aforesaid 20 bushels of corn, and did then and there unlawfully, forcibly, violently, and with strong hand retain possession of the said 20 bushels of corn, etc." The jury found a special verdict as follows: "The prosecutor had gathered his corn, and put it into a crib on his plantation, and locked the crib and left home. In his absence the defendants broke open the crib and carried away a part of the corn. W. H. Miller, a son of the prosecutor, was present and forbade the entry and the removal of the corn. Whether the defendants be guilty as charged, the jury are not advised. If the court should be of opinion that the defendants are guilty, the jury find them guilty. If the court should be of opinion that the defendants are not guilty, the jury find them not guilty." The court being of opinion with the defendants, a verdict of not guilty was entered, and judgment accordingly, and the State appealed.

Winston, Sr., for the State.
No counsel for defendant.

MANLY, J. The judgment of the Superior Court upon the special verdict is erroneous. In the absence of the father, the son had authority to forbid the entry into the crib, and the entry with *strong hand,* under such circumstances, is more than a civil trespass. The force is sufficiently manifest from the number of persons engaged, and from the violence committed on the building.

(240) It is not necessary the owner should be present always in his house to forbid the entry of a trespasser, in order to continue it under the protection of the law against this offense. A member of the family left in charge, forbidding, will have the same effect.

The possession of the son is the possession of the father, and it is, therefore, properly laid as a trespass to the latter's possession. Upon the whole, we conclude the offense is well laid, and the facts found in a special verdict constitute a case of guilt.

This should be certified to the Superior Court of Davie County, that the judgment may be reversed and judgment for the State awarded.

THE STATE v. ALEXANDER DUCKWORTH.

(1 Winst., 243.)

1. An indictment upon section 29, ch. 107, Rev. Code, is sufficient if it avers that the defendant did "permit the said slave, Peggy, to keep house to herself as a free person"; and, in the second count, did "connive at said negro slave keeping house to herself as a free person."

2. A., being the owner of a female slave, left the county several years before the finding of the indictment. At the time of going away he conveyed the house and lot, in which the slave lived, to the defendant, and gave him also a note for $50 in consideration that the defendant would support the slave and her husband, both being old, for the rest of their lives. This is a sale of the slave from A. to the defendant.

INDICTMENT tried before *Howard, J.*, at BURKE Fall Term, 1863. The indictment was as follows:

"The jurors for the State, on their oath, present that Alexander Duckworth, etc., being the owner of a certain female negro slave, named Peggy, on the, etc., unlawfully did permit said negro slave, Peggy, (241) to keep house to herself as a free person, contrary to the form, etc.

"And the jurors, etc., further present, that the said A. D., being the owner, etc., did unlawfully connive at said negro slave, Peggy, keeping house to herself as a free person, etc."

The witnesses testified that the slave was the property of one Smyth, who moved from Burke County several years ago; that she was reputed since that time to be the property of the defendant; that when Smyth left the county, he conveyed the house and lot in which the slave lived to the defendant, and gave him a note for $50, in consideration that he would take the slave and her husband, both old negroes, and take care of them the rest of their lives; that for a year or two after Smyth left, the defendant did furnish them with wood, provisions, etc., but for several years last past he had done nothing for the woman, the man being dead, and she had to support herself as she could, by begging and what little work she could do; and that the defendant has not of late exercised any control or supervision over her, but has permitted her to act entirely as a free woman.

The court charged the jury that the possession of the slave having been passed from Smyth to the defendant, the question was whether the contract between Smyth and the defendant was, at common law, a contract of bailment, or sale, and that this was a question of construction for the court; that, as the interest conveyed was the whole interest in the slave, and the obligation of the defendant the full duty of master or owner, it amounted to a sale, and the title passed to the defendant. The defendant excepted to the instructions given by the court to the jury. Verdict for the State, and judgment accordingly.

(242) *Winston, Sr., for the plaintiff.*
No counsel for defendant.

MANLY, J. The court below put, as we think, the proper construction upon the transaction between Smyth and the defendant. It passed the ownership of the slave to the defendant for reasons very clearly given by the court, and we deem it unnecessary to add more.

Looking into the record; we find the indictment has not employed all the phrases used in the statute for the description of the offense. The statute provides that "no slave shall go at large, as a freeman, exercising his own discretion in the employment of his time; nor shall any slave keep house to him or herself as a free person, exercising like discretion in the emlpoyment of his or her time; and in case the owner of the slave consent to the same, or connive thereat, he shall be deemed guilty of a misdemeanor."

The indictment charges that defendant, being the owner of the slave, "did permit her to keep house to herself as a free person," omitting the words, "exercising her discretion in the employment of her time."

We do not perceive that the words omitted would give any other signification to the words used than they express standing alone. To *keep house to oneself as a free person* involves with sufficient precision and certainty the exercise of one's discretion in the employment of his time, and no additional words would seem to be necessary to convey that idea; although it is best, and we therefore recommend the use of the terms and *all* the terms deemed proper by the Legislature for defining the offense; yet it is not necessary, provided the sense be perfectly preserved without.

(243) For like reasons we are of opinion that the substitution of the word "permit" for the word "consent" does not vitiate the indictment.

No error.

Cited: S. v. Brown, post, 449.

THE STATE v. SAMUEL MORGAN.

(1 Winst., 246.)

An indictment at common law for a "forcible entry into the house of John Bell, Mary Bell being then and there present and forbidding the same," is fatally defective for want of an averment that it is the dwelling-house of J. B., or that M. B. is the wife, daughter, or other member of the family of J. B.

INDICTMENT for forcible entry, tried before *French, J.*, at Spring Term, 1864, of BRUNSWICK.

The indictment is in these words: "The jurors for the State, upon their oath, present that Samuel Morgan, late, etc., with force and arms, and with a strong hand, unlawfully did enter upon the premises and into the house of one John Bell, Mary Bell being then and there present, and forbidding, against the peace and dignity of the State."

The jury found the defendant guilty. His counsel moved in arrest of judgment, and the judgment was arrested, and the State appealed.

Winston, Sr., for the State.
No counsel for defendant.

BATTLE, J. This was an indictment for a forcible entry at (244) common law, and after a verdict, finding the defendant guilty, the judgment was arrested in the court below, because there was no allegation in the indictment that the owner of the house was present at the time of the entry; and, although it was alleged that one Mary Bell was present, there was no allegation that she was in possession of the house, nor that she was a member of the prosecutor's family, or had any right to forbid the entry of the defendant. The counsel who has appeared for the State in this Court has endeavored to avoid the force of this objection to the indictmnet by contending that "house" *ex vi termini* means dwelling-house, and that at common law a forcible entry into a dwelling-house is a misdemeanor, whether the owner be present or not. In support of the latter part of his proposition, he referred to and relied upon 1 Hawk. P. C., Book 1, ch. 28, sec. 26. It is unnecessary for us to decide this question, because we do not assent to the position that a "house" means *ex vi termini* a "dwelling-house."

The law takes notice of different kinds of houses, and distinguishes dwelling-houses by giving them the preëminence above all others. Thus at common law noctural breaking of a dwelling-house is an offense of a higher grade than injury of a similar kind to other houses is held to be. Indictments for burglary must charge the house broken to be a dwelling-house, and it would be a fatal defect in the bill to describe it merely as "a house." So we think that if it be, as is contended, that a forcible

entry into a dwelling-house in the absence of the owner and his family is an indictable offense, the indictment must allege the house to be a dwelling-house. Were it otherwise, the indictment would not have that certainty as to facts and circumstances which is necessary to apprise the defendant of what is charged against him, so that he may know how to prepare his defense. Arch. Cr. Pl., 41.

(245) The indictment in the present case cannot, then, be supported as one for a forcible entry into the dwelling-house of the prosecutor. Being an indictment for a forcible entry into a house other than a dwelling-house, it ought to have charged that the offense was committed in the presence of the prosecutor, or, at least, of some member of his family. *S. v. McCanless,* 31 N. C., 375; *S. v. Walker,* 32 N. C., 234; *S. v. Caldwell,* 47 N. C., 469. Here the indictment does not charge the presence of the prosecutor, nor of any person who is stated to be a member of his family. It is, therefore, defective and insufficient. But it is contended by the counsel for the State that it is aided by the Rev. Code, ch. 35, sec. 114. That act was passed for the purpose of putting an end to objections founded upon mere informalities and refinements. The answer to this is that the defects in this indictment are matters of substance, for the Court cannot discover from the indictment that the house into which the illegal entry was made was the dwelling-house of the prosecutor, nor that Mary Bell was his wife, daughter, or other member of his family, having a right to forbid the entry of the defendant.

PER CURIAM. No error.

THE STATE v. WESLEY McDANIEL.

(1 Winst., 249.)

1. If a man breaks and enters into a dwelling-house by night, with intent to commit a felony, the crime of burglary is consummated, though after entering the house he desists from an attempt to commit the felony through fear, or because he is resisted.

2. The intent to commit a felony may appear from antecedent circumstances, and if there be a forcible entry into the house at night, the intent so appearing, it is burglary.

(246) INDICTMENT for burglariously breaking and entering a dwelling-house with intent to commit a rape, tried before *French, J.,* at Spring Term, 1864, of MONTGOMERY.

Mary Boyd, the prosecutrix, testified that in the month of August last, about one or two hours before day, she was asleep in the house of her sister-in-law, in Montgomery County, and was waked by the noise

of some one throwing something against the door and window; she got up and found the prisoner at the window; she asked him what he wanted; he answered, "Something good," and got down from the window and went to the back door and broke it open, entered the house, struck her violently with a water bucket, placed his hands across her breast and threw her down. She resisted as far as she was able. A child of her sister, about 9 years of age, struck at the prisoner with a stick, and the witness called to him to go to a neighbor's for help. As the child went off, the prisoner got off the person of the witness and left the house. The prisoner did not, when he first laid hands on her, or after he had thrown her down, attempt to raise her dress.

One witness testified that the prisoner was between 16 and 17 years of age. Another, that he was between 18 and 19. There was other evidence on the part of the State in confirmation of the testimony of the prosecutrix.

The prisoner is a free negro.

The court presented to the jury the testimony on the part of the State and prisoner, and instructed them on the law, to which instruction no exception was made.

The counsel for the prisoner requested the court to instruct the jury that although they were satisfied from the evidence that the prisoner broke and entered into the dwlling-house in the night-time, with the intent to commit a rape on the prosecutrix, yet if he afterwards desisted on account of the resistance he met with, or through fear (247) or any other cause, that the prisoner was not guilty.

The court declined to give the instruction, and instructed the jury that if they were satisfied from the evidence that the prisoner broke and entered into the dwelling-house in the night-time, with the intent to commit a rape on the prosecutrix, and afterwards, through resistance or fear, abandoned the intent, he was guilty. The counsel for the prisoner excepted. His counsel moved, in arrest of judgment, that the indictment charged an offense at common law, and under the statute in one and the same count, which motion was overruled, and judgment entered according to the verdict.

The indictment is as follows: "The jurors for the State, upon their oath, present that Wesley McDaniel, being a free negro, late of the county of Montgomery, not having the fear of God before his eyes, etc., on, etc., about the hour of 12 in the night of the same day, with force, etc., at, etc., the dwelling-house of one Adeline Boyd, there situate, feloniously and burglariously did break and enter with intent in and upon one Mary Boyd, being a white female in the said dwelling-house, then and there being, with force and arms then and there violenly, forcibly, feloniously, and burglariously, against her will, to ravish and carnally

know, contrary to the form of the statute in such case made and provided; and then and there, with force and arms, in and upon the said Mary Boyd, being a white female as aforesaid, in the peace of God and the State, in the said dwelling-house, then and there being, violently, forcibly, feloniously, and burglariously did make an assault, and her, the said Mary Boyd, in the said dwelling-house, then and there did beat, wound, and ill-treat, with an intent her, the said Mary Boyd, be-
(248) ing a white female as aforesaid, violently, forcibly, and against her will, then and there, in the said dwelling-house being, feloniously and burglariously to ravish and carnally know, and other wrongs, etc., contrary to the form of the statute, etc."

Winston, Sr., for the State.
No counsel for prisoner.

MANLY, J. There appears upon the record but one exception to the rulings of the judge below. After instructions upon the law of the case not complained of, the court was asked to inform the jury that, "although they were satisfied from the evidence the prisoner broke and entered into the dwelling-house in the night-time, with the intent to commit a rape on the person of the prosecutrix, yet if he afterwards desisted, on account of the resistance he met with, or through fear, or any other cause, the prisoner was not guilty."

The court declined to give the instructions thus asked, but told the jury, if they were satisfied from the evidence the prisoner broke and entered into the dwelling-house in the night-time with the intent to commit a rape on the prosecutrix, and afterwards, through resistance and fear, abandoned the intent, he was guilty. To this exception is taken.

We see no ground for a question either upon the propriety of refusing the specific instructions asked or upon the propriety of giving the instructions substituted therefor.

The definition of a burglar given by Sir Edward Coke is: "He that by night breaketh or entereth into a mansion house with intent to commit a felony."

A moment's consideration of the elements of this definition will show the groundless nature of this exception. It is apparently based upon the assumption that the felonious *intent* can only be made evident by its actual execution, which is a great mistake.
(249) This element of the offense may appear from circumstances happening antecedently to the act intended, and so appearing (other elements being conceded), the offense is consummated.

This view of the offense is supported by many adjudged cases and by the uniform practice; and accordingly we find a definition conforming

thereto, adopted by East, Russell, and other text-writers, viz.: "a breaking and entering a mansion house of another in the night with intent to commit some felony within the same, whether such felonious intent be executed or not."

This meets in all respects the case now before us, and by express words disposes of the prisoner's exception.

The case informs us there was evidence as to the intent laid before the jury, and proper instructions in relation thereto given by the court. There is no error, therefore, in the instructions given, and those asked for were rightfully refused.

We have examined the whole record with the care which its importance demands, and find no defect or impediment to hinder the due course of the law.

PER CURIAM. No error.

Cited: S. v. McBryde, 97 N. C., 399.

JOHN W. B. WATSON v. MOSES A. BLEDSOE.

(1 Winst., 253.)

A bond for a certain sum of money, payable to A. or order, with interest from a day preceding its date, is payable immediately, although it purports to be given for the price of bricks to be delivered at a subsequent day.

ACTION of covenant, tried before *Gilliam, J.*, at WAKE Fall (250) Term, 1863, in which the plaintiff declared on an instrument under seal of the tenor following:

With interest from 14 November, 1854, I promise to pay to J. W. B. Watson, or order, $500 for 100,000 bricks, to be delivered during March or April next, as the said Bledsoe may determine, and he pay for the hauling. Witness my hand and seal this 19 December, 1854.

M. A. BLEDSOE. [L. S.]

On the trial the plaintiff proved the execution of the instrument declared on, and stopped his case. The defendant moved to nonsuit the plaintiff, which motion was denied by the judge. The defendant then offered evidence to prove that the plaintiff had delivered only a part of the bricks. The evidence was rejected by the judge. Verdict and judgment for the $500, with interest from 15 November, 1854.

Mason and Fowle for plaintiff.
K. P. and R. H. Battle for defendant.

PEARSON, C. J. The general rule is, when by a contract of sale an article is to be delivered at a future day, the payment of the price and the delivery of the thing are to be concurrent acts, and the promises are held to be "dependent" on the ground that each party is supposed to intend to hold on to his own as a mode of compelling payment on the other side. But if the purchaser agrees to pay the price *before* the day on which the thing is to be delivered, the promises are held to be "independent," because that circumstance shows that he relies on his remedy by action to compel performance on the part of the vendor. 1 Saund., 320, note, *Pordage v. Cole.*

(251) The question is, Does the bond oblige the defendant to pay before the bricks are delivered? If it had been drawn "one day after date," which is a form usual in this country, or "on demand," "I promise," etc., there could have been no question about it. We are of opinion that the bond is a present promise to pay on the day of its date; it purports to be such, and although the fact that the bricks, which are to be delivered in March or April, are set out as the consideration, instead of the usual words, "for value received," would, were there no other facts, qualify the promise to pay, and give it the meaning of "I *am* to pay $500 for 100,000 bricks, to be delivered, etc.," we are satisfied, from the other facts on the face of the instrument, that it is, as it purports to be, a present purpose to pay, and was not intended to be dependent upon the delivery of the bricks.

1. It is in the usual form of a negotiable bond, payable to J. W. B. Watson, or "order"; so the parties intended it to be negotiable, which is inconsistent with the intention that it should be dependent on the delivery of the bricks; for, if so, it is not negotiable (*Goodloe v. Taylor,* 10 N. C., 458); so the fact that it is expressly payable to order must be rejected, or the fact that it refers to the bricks as the consideration must be taken as a mere memorandum or surplusage, and the words of the instrument are to be taken most strongly against the obligor, for they are his words.

2. The defendant obliges himself to pay interest from 15 November, 1854. This shows that it is not the ordinary transaction of the purchase of an article to be delivered at a future day, and to be paid for when delivered; or the price will not bear interest until it was due; so the face of the instrument proves that the price was not only payable on the day of its date, but, according to the contract, was payable before, viz., on 15 November, 1854, and back interest is to be paid for

(252) the forbearance to collect.

PER CURIAM. Affirmed.

DEMPSEY BLAKE AND OTHERS v. WILLIAMSON PAGE.

(1 Winst., 255.)

A testator, in 1819, bequeathed to his daughter a negro woman, "to her and her heirs of her own body forever; and if none, to return after her death to the rest of my children equally." The limitation over to the testator's other children is not too remote.

APPEAL from *Gilliam, J.*, at Fall Term, 1863, of WAKE.

Petition for the division of slaves. The only material fact in the case is stated in the opinion of the Court.

Moore for petitioner.

Fowle, G. W. Haywood, and Phillips for defendants.

BATTLE, J. The controversy in this case arises upon the construction of the following clause in the will of Dempsey Blake, deceased: "I give and bequeath to my daughter Anne my negro woman Sarah, to her and her heirs of her own body forever; and if none, to return after her death to the rest of my children equally." The question is, whether the limitation over to the rest of the testator's children is too remote, and therefore void. The will was made in 1819, so that the construction is not controlled by the act of 1827; and that act cannot be allowed to influence our decision, except, perhaps, as indicating to us that the Legislature of that year thought the courts had gone too far in holding that the expressions "dying without heirs," or "heirs of the body," or "without issue," or "issue of the body," etc., meant an indefinite failure of such heirs or issue, and not heirs or issue living at the death (253) of the testator. Many decisions, both of the English courts and of those of this State, affecting the question now before us, have been brought to our attention by the counsel, and the task of showing an entire consistency among them would be a difficult one, if it were necessary for us to undertake it. From this difficulty, however, we are relieved by one or two recent adjudications of this Court, the authority of which we do not feel ourselves at liberty to dispute.

In *Baker v. Pender,* 50 N. C., 351, the bequest was in the following words: "The balance of the property to be for the sole use and benefit of my wife, to her and her heirs lawfully begotten of her body, forever; but should my wife die without heirs of her body, then, at her decease, the whole of the property to go to the use and benefit of my daughter Nancy and her heirs forever." The contest was about a slave, and the question was whether the limitation over to the testator's daughter Nancy, who was a child by a former wife, was too remote. In delivering the opinion of the Court, it was said: "Without entering into the

question whether the word 'then' is an adverb of time or a merely relative adverb, about which much is to be met with in the books, we are satisfied that the words 'at her decease' fix the happening of that event as the time at which the limitation over must take effect, if it takes effect at all, and that consequently it is not too remote. 'At' is a more precise word of time than 'after,' and it is settled that 'after her death' is sufficient to restrict the limitation. *Pinbury v. Elkin,* 1 Péere Williams, 563; *Wilkinson v. South,* 7 Fearne, 555; 1 Fearne, 473; Smith, 557; 2 Roper Leg., 370." In the subsequent case of *Newkirk v. Howes,* 58 N. C., 265, the bequest was: "I also lend to my daughter Penny Newkirk, during her natural life, the following negroes, viz., etc., and at her decease to the lawful heirs of her body, if any such there
(254) be; and if none, to the lawful heirs of my body, and to be equally divided amongst them." The decision was in favor of the validity of the limitation over, as being not too remote, the Court holding that it made no difference whether Penny Newkirk took an estate for life, with a limitation to the heirs of her body as purchasers at her decease, or whether she took the absolute estate under the effect of the rule in *Shelley's case,* as applied to bequests of personality, and that the time was fixed, and the limitation over depended upon her having heirs of her body at her decease. "The force of the words 'at her decease' pervades the whole clause, and manifestly qualifies both of the limitations. 'To the lawful heirs of her body, if any such there be.' When? Clearly at her decease. 'And if none such there be.' Equally clearly at her decease; that is, to the lawful heirs of her body, if any such there be at her decease, and if none, to return to the lawful heirs of my body."

The words of the bequest in the case now before us vary somewhat from those in the cases to which we have referred, but we are decidedly of opinion that the meaning is the same. The slave is given to the testator's daughter, Anne, and to the heirs of her own body; but if none, to return after her death to the rest of his children. "If none" means if she had no heirs of her own body, that is, children or the issue of children, the slave was, after her death, that is, as soon as she was dead, to return to the rest of his children. The expressions in *Pinbury v. Elkin* and *Wilkinson v. South, ubi supra,* were similar to those of the present case, with the exception that they contained the word "then," as "then after his decease" the property, which was personal, was given over to other persons. We think the construction must be the same whether the word "then" be inserted or not. The word, when used in such a connection, is not an adverb of time, as some have supposed, but is to be understood as a relative adverb in the sense of "in that case" or "in
(255) that event"—that is, in the case or in the event of a "default of

such issue" the property shall, "after the decease" of the first taker, go over to another. Thus explained, these cases are direct authorities in favor of the construction which we adopt in the present case.

Decree accordingly.

Cited: Springs v. Hopkins, 171 N. C., 494.

JAMES R. WALKER v. SALLY WALKER.

(1 Winst., 259.)

1. Parol evidence is admissible to show what matters are submitted to arbitration and what matters are brought to the notice of the arbitrators.

2. An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision. But when arbitrators act within the bounds of their authority, their decisions on questions of law and of fact are binding on the parties, unless the arbitrators acted corruptly or committed gross errors.

ACTION of debt on award, tried before *Heath, J.,* at Fall Term of ORANGE, 1863.

It appeared on the trial that the plaintiff and defendant, on 23 March, 1859, chose John U. Kirkland and John Berry to settle a dispute between them by arbitration, and executed an instrument under seal, of which the following is a copy:

"Know all men by these presents, that James R. S. Walker and Sally Walker, both of the county of Orange and State of North Carolina, acknowledge themselves indebted in the sum of $5,000 to any person suing for the same, good and lawful currency of North Carolina, for which we bind ourselves and our heirs and assigns. In testimony whereof we set our hands and affix our seals, this 23 March, 1859.

"The condition of the above obligation is such whereas James (256) R. S. Walker and Sally Walker have agreed to leave a matter of dispute to referees, as they cannot settle it themselves, viz., John U. Kirkland and John Berry; they are their referees to settle the matter in controversy. James R. S. Walker having his letters examined on trial with other testimony. Sally Walker having the privilege to produce testimony on the trial to rebut the evidence in said letters, with the understanding that the said James R. S. Walker is to leave the mills which are in dispute, surrender to Sally Walker the mill key and leave within ten days after this paper is signed. Then, after the referees hearing the testimony on both sides shall decide that James R. S. Walker is entitled to damages, whatever the damages shall be laid at, the said Sally Walker is to pay to the said James R. S. Walker; but should the

referees find, upon examination, that Sally Walker is damaged, iustead of James R. S. Walker, then the said James R. S. Walker is to make it good to Sally Walker, whatever it be."

The arbitrators found that the plaintiff had removed from Tennessee to this State, at the solicitation of the defendant, and in expectation of pecuniary advantages promised by her, and that he had suffered a loss thereby of $500, and that he was not indebted to her on the mill books or otherwise,, and they award that she pay him $500, and that he deliver to her the mill books. The plaintiff proved the performance of what he was required to do, both by the deed and the award. The defendant contended that the arbitration had been corruptly conducted, and as evidence of this allegation showed that she had offered evidence before the arbitrators of a battery committed on her by the plaintiff, whereby she insisted she was greatly injured, which the arbitrators refused to hear. The plaintiff contended that this matter was not submitted to arbitration, and offered to show that the only matter submitted was a question of damages alleged to have arisen from the plaintiff's having
(257) removed from Tennessee to North Carolina because of promises made by the defendant to him, which were alleged to have been broken. To the reception of this evidence the defendant objected, on the ground that as the submission was by deed, parol evidence could not be given to show what was submitted. The judge permitted the evidence to go to the jury, reserving the question of its competency, and giving leave to the defendant to move to enter a nonsuit in case he should be of the opinion that the evidence offered by the defendant was competent. Under the instructions of the court, the jury found a verdict for the plaintiff for the amount awarded and interest. The defendant moved to enter a nonsuit according to leave given. The court refused the motion and gave judgment for the plaintiff upon the verdict.

Fowle for plaintiff.
Phillips for defendant.

BATTLE, J. It is a general rule that where an arbitrator does not make his award upon all the matters submitted to him, the award is entirely void; and the defect may be shown as a defense to an action on the award. Watson on Arb. and Award, 59 Law Lib., 121. But where the submission is of all matters in difference, or of all disputes, without specifying them, the arbitrator may make his award only of such things as he has notice. Yet the award is good. *Ibid.* How can these rules be made of any practical benefit to parties unless parol evidence is admissible to show what matters were within the terms of the submission, or were brought to the notice of the arbitrator? That such evidence is ad-

missible for such purposes was directly decided by this Court, in *Brown v. Brown,* 49 N. C., 123. Indeed, on the trial of the very case now before us, the presiding judge, notwithstanding the submission was in writing, admitted parol evidence on the part of the plaintiff to (258) show that a certain matter was the only one submitted to the arbitrators; and it seems to us that upon the same principle the defendant ought to have been permitted to offer testimony to rebut that of the plaintiff, by showing that another matter was embraced within the terms of the submission, and was not acted on by the arbitrators.

But it is contended by the counsel for the plaintiff that the testimony offered by the defendant and rejected by the court was irrelevant, because it could tend to prove only that the arbitrators had committed a mistake in a matter of law, which, if so, would not hurt their award. That is true, if the mistake be committed when the arbitrators are acting within the scope of the authority conferred upon them, and upon matters within that scope. But it cannot be so as to an error in law, by means of which they are induced to embrace within their award a matter not submitted, or reject one which was submitted to them. See 1 Green. Ev., sec. 78. What are the terms of the submission, what is the true construction of such terms, and what things are embraced within them, may present questions of law or of fact; and when presented the questions can only be decided conclusively, not by the arbitrators, but by the proper judicial tribunals of the country. But when the arbitrators are acting within the bounds of their authority, and only within those bounds, then they are the judges of the parties' own selection, and their decisions on questions of law and of fact are binding on the parties, unless it can be shown that the arbitrators acted corruptly or committed gross errors or mistakes in making their award. See the same section of Greenleaf on Evidence.

His Honor having erred in rejecting the testimony offered by the defendant, the judgment must be reversed, and a

Venire de novo. (259)

Cited: Walker v. Walker, 61 N. C., 546; *Osborne v. Calvert,* 83 N. C., 371; *Cheatham v. Rowland,* 105 N. C., 222; *Patton v. Garrett,* 116 N. C., 858; *Millinery Co. v. Ins. Co.,* 160 N. C., 141.

JAMES W. HADEN AND OTHERS v. JOHN A. BRADSHAW AND OTHERS.

(1 Winst., 263.)

Where a person, in his last sickness, desired the physician to write his will, and the physician declined to do it, but told him that A. and B. were in the piazza, and that he might make his will by oral declarations in their presence; and A. and B. were called into the sick man's presence by his direction, and, addressing A. by name, he stated to him in presence of B. and the physician how he wished his property to be divided, and named A. and another as his executors; that is sufficient *rogatio testium* to make a valid nuncupative will.

ISSUE of *devisavit vel non,* tried before *Bailey, J.,* at Fall Term, 1863, of ROWAN.

Henry R. Bradshaw, a citizen of the county of Cabarrus, was on a visit to his brother-in-law, James W. Haden, who lives in the county of Davidson, and while there was taken sick and continued so until he died on 1 May, 1863. Dr. Shamwell attended him as his physician. He testified that he was requested by the deceased to write his will and also to send for a minister of the gospel. The doctor told him that he could not write his will then, but that he (the deceased) could make a will by expressing his wishes before two or three witnesses, and that March and Smith were in the piazza. The deceased then requested him to call them into the room. The doctor called them into the bedroom where the deceased lay. The deceased addressed March by the name of Hense, saying:

(260) "Hense, I am worth about $13,000 in money and notes. I wish this equally divided between the children of my deceased sister, Elizabeth Haden, and my sister Julia Cuthsell. I want my sister Julia's share so arranged that it will not come into the possession of her husband, nor for him to have anything to do with it, but to be for the use of her and her children. I want Obadiah M. Smith to have $500 for waiting on me. I want my burial expenses and my debts paid, and the balance of my property divided between my half sisters, so that Laura may have a fraction the most. I don't care so Laura gets a fraction the most; there will not be a great deal. I wish A. H. March and James H. Haden to be my executors and settle up my business."

This witness also stated that the deceased was of sound mind and memory at the time.

A. H. March testified that when he went into the room he was addressed by deceased as "Hense," and he made a disposition of his property in the words stated by Dr. Shamwell. He further said that the deceased was of sound mind at the time.

The words above stated to have been spoken by deceased in his last illness were reduced to writing within four days after they were spoken. The words as reduced to writing were propounded as the last will and testament of Henry R. Bradshaw. The jury, under instructions as to the sanity of the deceased, rendered a verdict that it was the last will and testament of the deceased; the question of law being reserved whether the requisitions of the statute had been complied with. The court being of opinion with the caveators, set the verdict aside.

Boyden and Winston, Sr., for the propounders.
Wilson for the caveators.

BATTLE, J. In the probate of a muncupative will the court (261) ought to see that everything which the statute requires has been fully and faithfully observed. *Rankin v. Rankin*, 31 N. C., 156; *Brown v. Brown*, 6 N. C., 350. In the present case it is admitted by the counsel for the caveators that every requisition of the act (Rev. Code, ch. 119, sec 11) has been complied with except what is called the *rogatio testium*, the calling upon the witnesses to the will, or some of them, "to bear witness thereto," by the testator himself. This the counsel contends was not done; but we think he is clearly mistaken. The witnesses to the will were Dr. G. N. Shamwell, A. H. March, and O. M. Smith, the last of whom was not examined because he was a legatee. Exclusive of Smith, there were two witnesses, the number required by the statute. Of these, A. H. March was unquestionably called upon to bear witness to the will. He was invited into the room for that very purpose, was addressed by the testator, who proceeded to state what he wished to be done with his property. It is true that he did not say to March that it was his will which he was making, but he stated what disposition he wished to be made of his property, and to show that it was in contemplation of death, he named the persons who were to act as executors. March, then, must have known that the testator was making his will, and that he himself was called upon to bear witness to it. Dr. Shamwell was then in the room, and heard the will, as it was dictated by the testator. But it is objected that he was not intended to be a witness, and was not addressed as such by the testator. In reply it may be said that it does not appear from the circumstances of the transaction that he was to be excluded as a witness; and from the fact that the testator had just before requested him to write his will, it may well be inferred that he was to be a witness, though the two other persons named were more especially to be called in for that purpose. The statute requires only that some of the witnesses present at the making of a nuncupative will shall be "specially required to bear witness" to it. The object of this requirement of the statute is that it may be known with certainty that the testa- (262)

tor was making his will, and that the witnesses, by having their attention drawn to it, may understand and be able to recollect what the will was. This object is, in the estimation of the law, accomplished when the attention of any one of the witnesses is called to the transaction, and that was certainly done in the present case. In our opinion, then, his Honor in the court below erred in holding and instructing the jury that the will was not well proved.

PER CURIAM. Error.

Cited: Smith v. Smith, 63 N. C., 640; *Bundrick v. Haygood,* 106 N. C., 472; *In re Garland Will,* 160 N. C., 558.

THE STATE v. JESSE BLACK.

(1 Winst., 266.)

A husband cannot be convicted of a battery on his wife unless he inflicts a permanent injury or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement.

INDICTMENT for assault and battery, tried before *Bailey, J.*, at Spring Term, 1864, of ASHE.

The defendant was indicted for an assault on Tamsey Black, his wife. The evidence showed that the defendant and his wife lived separate from one another. The defendant was passing by the house of one Koonce, where his wife then resided, when she called to him in an angry manner and asked him if he patched Sal Daly's bonnet (Sal Daly being a woman of ill-fame). She then went into the house, and (263) defendant followed her and asked her what she wanted, when she repeated her question about the bonnet. Angry words then passed between them. He accused her of connection with a negro man, and she called him a hog thief, whereupon the defendant seized her by her hair, and pulled her down upon the floor, and held her there for some time. He gave her no blows, but she stated on the trial that her head was considerably hurt, and that her throat was injured, and continued sore for several months, but that he did not choke her nor attempt to do so. At the trial she was entirely recovered. After she got up from the floor, she continued her abuse of him. A verdict of guilty was entered, subject to the opinion of the court. The judge being of opinion with the State, gave judgment accordingly.

STATE *v.* BLACK.

Winston, Sr., for the State.
No counsel for defendant in this Court.

PEARSON, C. J. A husband is responsible for the acts of his wife and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.

Certainly, the exposure of a scene like that set out in this case can do no good. In respect to the parties, a public exhibition in the courthouse of such quarrels and fights between man and wife widens the breach, makes a reconciliation almost impossible, and encourages insubordination; and in respect to the public, it has a pernicious tend- (264) ency; so, *pro bono publico,* such matters are excluded from the courts, unless there is a permanent injury or excessive violence or cruelty indicating malignity and vindictiveness.

In this case the wife commenced the quarrel. The husband, in a passion provoked by excessive abuse, pulled her upon the floor by the hair, but restrained himself, did not strike a blow, and she admits he did not choke her, and she continued to abuse him after she got up. Upon this state of facts the jury ought to have been charged in favor of the defendant. *S. v. Pendergrass,* 19 N. C., 365; *Joyner v. Joyner,* 59 N. C., 322.

It was insisted by Mr. Winston that, admitting such to be the law when the husband and wife lived together, it did not apply when, as in this case, they were living apart. That may be so when there is a divorce "from bed and board," because the law then recognizes and allows the separation, but it can take no notice of a private agreement to live separate. The husband is still responsible for her acts, and the marriage relation and its incidents remain unaffected.

New trial.

Cited: S. v. Rhodes, 61 N. C., 455; *Vann v. Edwards,* 128 N. C., 428; *S. v. Jones,* 132 N. C., 1048; *S. v. Thornton,* 136 N. C., 616; *S. v. Fulton,* 149 N. C., 498, 500; *Price v. Electric Co.,* 160 N. C., 455; *S. v. Nipper,* 166 N. C., 278; *S. v. Knight,* 169 N. C., 362.

THOMAS P. BURGWYN v. B. F. LOCKHART.

(1 Winst., 269.)

1. If there be two private ways, though not cartways, leading from the land of a petitioner for a cartway, under ch. 101, sec. 37, Revised Code, to the public road to which he seeks access, and if the petitioner have also by a parol license an unobstructed passage through the lands of a third person to the public road, the petitioner is not entitled to have a cartway laid off for him, unless it appear to the court trying the case that, notwithstanding such private ways and license, it is "necessary, reasonable, and just" that the petitioner should have it.

2. The inference from evidence tending to show that a way over and through a man's land is a public road may be rebutted by evidence of nonuser for more than twenty years.

(265) PETITION for a cartway over the defendant's land, heard by *Heath, J.*, at Spring Term of NORTHAMPTON, 1863.

The facts are stated in the opinion of the Court.

Barnes for petitioner.
Conigland for defendant.

BATTLE, J. This petition was filed under the provisions of the Revised Code, ch. 101, sec. 37, which gives to any person, settled upon or cultivating any land, to which there is no public road leading, a right to a cartway over the land of others, whenever it shall appear "necessary, reasonable, and just" that he shall have such way to any public road, ferry, bridge, or public landing. The defendant put in an answer denying the right of the petitioner to have a cartway laid out across his land; and, among other objections, he insisted upon the hearing in the Superior Court that the desired road was not "necessary, reasonable, and just," and offered to show that there were two private ways—though not cartways—from the lands of the petitioner to the public road to which he wished to go, over the lands of other persons; and also that the plaintiff had, by a parol license, an unobstructed passage through the lands of one Burgwyn to the aforesaid public road. The presiding judge held that these facts would not bar the right of the petitioner to have a cartway, and declined to hear the evidence. In this we think his
(266) Honor erred, in consequence of which the order in favor of the petitioner must be reversed, and the case sent back to be heard again.

The enactment in the Revised Code, to which we have referred, is substantially the same with that contained in the Revised Statutes, ch. 104, sec. 33. The case of *Lea v. Johnson*, 31 N. C., 15, decided under the

last mentioned act, shows that it is to be construed strictly; for the establishment of a cartway over the land of any person without his consent is to deprive him of his full and free enjoyment of his land for the benefit of another. The latter, then, must show that he comes completely within the requirements of the act before he can claim its benefits. He must be a person settled upon or cultivating land to which there is no public road leading, and that it is "necessary, reasonable, and just" that he shall have a cartway over his neighbor's lands in order to give him access to some public place. Now, if he already have such access by means of a private way, equally convenient, over the lands of other neighbors, why should be be allowed to burden the land of still another person by having a cartway laid out over it? We think it clear that he should not, for in such a case an additional way to the prejudice of that other person will *not* be "necessary, reasonable, and just." There is nothing in the argument that one cannot be barred of his right to a cartway by reason of his having a *private right of way.* He may be barred by that as well as anything else that shows that it is not "necessary, reasonable, and just" that he should have a cartway. The evidence proposed to be given to the presiding judge may not have established the fact for which it was offered; but as, on the other hand, it may have had that effect, the judge ought to have received and considered it, and it was error in law for him to refuse to do so.

There were other objections urged at the hearing in the court (267) below, against the petitioner's claim, which it is unnecessary for us to notice very particularly. One was that the petitioner had formerly instituted suit for the same purpose against the immediate ancestor of the defendant, had obtained an order for a cartway through his land, and then abandoned the proceedings. The record of that case shows that the proceedings were against other persons besides the defendant's ancestors, and that the cartway, as laid out, was to run through their lands as well as his; so that, even supposing that if the suit had been against the ancestor alone, it would have been a bar in the present case (which we are not prepared to admit), it cannot have the effect claimed for it by the defendants, because it is not for the same cause of action.

We are inclined to think that the evidence offered failed to show that there was, at the time when the petition was filed, any public road running through the lands of the petitioner, and that the presiding judge was right in so deciding. The evidence in favor of such a road was rather slight, and was rebutted, we think, by the testimony offered to show that it had not been used as such for more than twenty years.

The remaining objection was that the land of the petitioner once formed a part of a large tract, part of which abutted on the public road to which he now seeks access, and that though it is now cut off from such

public road by a partition among the tenants in common of the large tract, yet the owner has by operation of law a right of way to the public road through the lands of the other former tenants. It is unnecessary to decide the question raised by this objection, because it involves the same principle as that as to which we shall be compelled to send the case back to be heard again in the Superior Court. If the defendant shall succeed in proving that the petitioner had already such rights of way to the public road as would show that it is not "necessary, reasonable, and just" that he shall have a cartway over the land of the de-
(268) fendant, the object of his petition must fail, whether he obtained his right or rights of way by grant, prescription, or the mere operation of law.

PER CURIAM. Error.

Cited: Plimmons v. Frisby, ante, 201; *Warlick v. Lowman,* 103 N. C., 124; *Burwell v. Sneed,* 104 N. C., 121; *Cook v. Vickers,* 144 N. C., 314.

DOE ON DEMISE OF OBADIAH PAGE AND WIFE v. JOSIAH ATKINS.

(1 Winst., 273.)

1. Whenever a testator shows an intention to dispose of all his property, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass.

2. Testator gave a tract of land to his wife for life, and after several bequests of money and specific legacies says: "My desire is that all the property that I have not willed away shall be sold after my death and equally divided between my six children," etc.: *Held*, that the reversion in the land after the end of the widow's estate for life passes by the residuary clause. Until the sale, the reversion descends to the heirs at law, and this whether the sale is to be made by the heirs or by the executor.

EJECTMENT, tried before *Gilliam, J.*, at Spring Term, 1864, of ORANGE.

The facts of the case are stated in the opinion of the Court, except that the *feme* lessor of the plaintiff is one of the heirs at law of the testator. Judgment in the court below was given for the defendant.

Graham for plaintiff.
Phillips for defendant.

BATTLE, J. Josiah Atkins, the elder, after devising to his wife
(269) an estate for life in his land, and giving some specific legacies to

her and to two of his daughters, bequeathed to his two granddaughters, Elizabeth Atkins and Sarah Atkins, $5 each, and then added the following residuary clause: "My desire is that all the property that I have not willed away shall be sold after my death and equally divided between my six children, Josiah Atkins, William S. Atkins, James H. Atkins, Lucinda Burroughs, Martha Atkins, and Ann Eliza Atkins, so as to make each share equal." The *feme* lessor of the plaintiff is one of the granddaughters mentioned in the will as a legatee of $5, and claims that the reversion in the land given to her grandmother for life did not pass by the residuary clause of her grandfather's will, and that she is entitled, since the death of the tenant for life, to a share thereof, as one of the heirs at law of the devisor. The question is, whether her claim is well founded, and we are decidedly of opinion that it is not. In 6 Cruise's Dig., Tit. 38, ch. 10, sec. 117 (see 3 Green. Cruise, p. 251), it is said that "with respect to the words necessary to pass estates in reversion, wherever a testator shows an intention to dispose of all his property by his will, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass." Thus the words, "the rest of my lands in Somersetshire, or elsewhere, I give to my brother," "all my lands not settled or devised" I give to T. K. and his heirs, "all my lands not before devised" to be sold and the money divided among my younger children, were in different cases held to pass the reversions which the devisors had in the lands. See, also, 1 Jarman on Wills, 591. That the words "all my property" are as effective to pass reversions as the words "all my lands" cannot be doubted. See *Hurdle v. Outlaw,* 55 N. C., 75. It is true that where the devisor manifests an intention that his reversion in land shall not pass by general words, then a different construction shall prevail. 6 Cruise's Dig., Tit. 38, ch. 10, sec. 129 (see 3 Green. Cruise, p. 255). Thus is *Harris v. Mills,* 4 (270) N. C., 149, where a testator, after giving a tract of land to his son B. for life, by another clause of his will devised thus, "I give and bequeath to my son B. and my four daughters all the rest of my estate, consisting of various articles too tedious to mention," it was held that the reversion in the land did not pass to B. and the daughters under the residuary clause, but descended to the heir at law, though there was a bequest in the will giving him twelve shillings. It seemed to be taken for granted by the Court that the words, "all the rest of my estate," would have been sufficient to have embraced the reversion in the land had there been no explanatory words annexed to them. But, say the Court, the testator undertook to specify the estate to be given away, to wit, that it consisted of various articles too tedious to mention. "Thus the terms, as well as the description of them, are strictly referable to personal property. No person would understand the word 'article' as

relating to land; nor would it be tedious to mention a reversion, although it would have been so to enumerate the great variety of articles of which chattel property usually consists." This case, thus explained, is not in opposition to the general rule, but virtually admits and sustains it.

In the language of the will now before us, we are unable to discover any intention of the testator not to dispose of the reversion in the land which he had given to his wife for life. The words "all the property that I have not willed away" are, beyond all doubt, sufficient to embrace the reversion in the land, and it does not appear from the will, nor has it been shown from any extraneous proof, that the testator owned any property, either real or personal, of much value besides such reversion. The only circumstance relied upon to show that the testator did not intend to include the reversion in the residuary clause, which is, (271) that he directed a sale of the property after his death, does not, in our opinion, support the conclusion attempted to be drawn from it. It is contended that "after his death" means "at" or "immediately after" that event, and that the testator could not have wished the reversion to be sold as such in the lifetime of his widow. The reply is that though the words "after his death" may have in law the meaning attached to them in the argument, it may be that the testator did not know it, or at least advert to it, at the time he penned the clause; and further, that if he did, the inconvenience of a sale of the reversion is too slight a circumstance to control the meaning of the strong language, that all the property which he had not willed away should be sold and equally divided among his six sons and daughters.

There can be no doubt that the reversion of the land descended to the heirs at law until the sale. This was so, whether the sale was to be made by the heirs or by the executor, for he could at best have but a naked power. If this point, taken for the first time in this Court, had been insisted upon, it would have prevented the Court from deciding the very question for which the suit was instituted. But, as we understand that, upon the engagement of the defendant's counsel to pay all the costs of the suit, the objection is withdrawn, we must affirm the judgment given in the court below, upon the only question which was presented to the judge presiding therein.

PER CURIAM. Affirmed.

Cited: Foil v. Newsome, 138 N. C., 123.

JOHN BAKER, EXECUTOR, v. RICHARD HARRIS.

(1 Winst., 277.)

1. An action on the case, brought by A. against B., for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C. against B. for the same act of removing, and are challenged by the plaintiff. This is a challenge to the polls *propter affectum*, and not to the array.

2. It is a principal cause of challenge, involving matter of law, and therefore the judgment of the court below upon it may be reviewed in this Court.

3. The jurors challenged are under a legal bias by reason of having decided the case of A. against B., and the challenge ought to be allowed, and this although additional evidence is to be adduced on the second trial.

4. Jurors ought not to be asked, either on oath or otherwise, whether their minds are in such a state that they can try a case fairly and impartially. Their answers can have no influence on the question of their competency, and it is an improper practice to ask them.

ACTION on the case against the defendant for fraudulently re- (272) moving a debtor to the plaintiff, from the county, tried before *Bailey, J.*, at Fall Term, 1863, of ROWAN.

The counsel for the plaintiff challenged the jury (being the original panel) and assigned for cause of challenge that the jury had tried the case of *Goodman v. Harris*, the same defendant as in this case, for the same act of removing the debtor, and had given a verdict for the defendant. The court inquired of the plaintiff's counsel whether they expected to offer any evidence in addition to that offered in the case of *Goodman v. Harris;* they answered that they should offer the same witnesses they had examined in the case of *Goodman v. Harris* with additional evidence by other witnesses.

The judge then proceeded to try the cause of challenge, no objection being made thereto by the plaintiff. Each juror was sworn, and each severally asked whether, if additional testimony was offered, he believed he could give the plaintiff a fair and impartial trial. Each juror answered that in case no additional testimony was offered in the cause, that he would find in the same way he found in the case of Goodman, but if additional testimony was offered, he believed to could give the plaintiff a fair and impartial trial. (273)

The court thereupon ordered the jury to be impaneled.

In the course of the trial several exceptions were taken by the plaintiff to the decision of the judge on questions of evidence, but it is unnecessary to state them, as this Court gives no opinion on them.

There was a verdict for defendant, and the plaintiff appealed.

Wilson for plaintiff.
Boyden and Winston, Sr., for defendant.

MANLY, J. There is no cause assigned upon the record for a challenge to the array, and we consider the case, therefore, as a challenge to the polls. It was so treated in the court below.

Challenges of this sort lie under three principal divisions: (1) *propter honorem;* (2) *propter defectum;* (3) *propter affectum.* Of the last, under which lies our case, there are two sorts; the one working a principal challenge, the other to the favor. And the first question that presents itself for our consideration is whether the cause assigned be principal cause or cause for challenge to the favor only. For if it be of the latter class, whether it be tried through consent of parties by the judge or decided by triers appointed for the purpose, it is a subject of *discretion,* and cannot be reviewed in this Court.

Many cases of the one class approach those of the other so nearly as to be hardly distinguishable.

(274) The one before us, however, does not seem to be incumbered with much of this difficulty, and we are of opinion that it falls under the class of principal challenge. According to the explanation in Joy's treatise on the subject, a principal challenge under the head *propter affectum* is where there is express malice or express favor, and is a judgment of law, either without act on the part of the proffered juror or a judgment of law upon his act. Upon the cause assigned in the record before us, viz., the act of trying as a juror the former case (the facts being conceded), the law draws a conclusion as to his fitness or unfitness. Hence, the cause is one for principal challenge, which, in the court below, involves questions of law, and is subject to be reviewed in this Court. *Sehorn v. Williams,* 51 N. C., 575, presents questions of challenge to a juror. It was a plain case of principal challenge, and is an authority on the point here stated, if any were needed.

The action is against the defendant for fraudulently removing a debtor from the county. (Rev. Code, ch. 50, sec. 14.) It seems that divers creditors had commenced actions against the defendant upon the same allegation, one of which had been tried before, and the jurors tendered on the trial of this case had set on that trial and rendered a verdict for the defendant. This was assigned as cause for principal challege, and we think well assigned.

It is a well established and ancient usage not to allow a juror to sit a second time on the same cause, and it matters not whether the same only or other additional or different witnesses are to be examined. The juror is alike unfit. This does not differ substantially from the case now before us. Then the *corpus* to be proved is precisely the same that it was

on the trial at the suit of the other creditor. It is in the nature of a criminal information, in which the allegation is that defendant removed or assisted to remove the debtor from the county with intent to defraud creditors. If he did so in respect to one creditor, he did so in respect to all. The juror has decided the case under oath as to one, and if the conclusion to which he came in that case be true, it is equally (275) true of all the others, however they may happen to appear on divers trials. It is not in the nature of man, even in the most conscientious of the race, to divest himself altogether of prepossession or bias in favor of a judgment so solemnly formed; and it is difficult to perceive how the bias can be less in the special case before us than in the case of a juror called to try the same cause a second time. It is indeed substantially a requirement of the latter class, and is a strain which the law does not allow to be put upon the conscience of a juror. It is important, in order to preserve the trial by jury as a safeguard for rights that the juror should not only be intelligent and of sound moral sense, but free from all prejudice.

We take no account of the information, elicited by the judge from the plaintiff's counsel, that some additional testimony was to be examined; for, as in the case of a juror offered a second time in the same cause, it would make no difference, so in this case we think it would not affect the juror's competency.

We have passed over also, as matters of no weight in the cause, the answers given by the jurors to the inquiry whether, if additional testimony was offered, they could give the plaintiff a fair and impartial trial. The law upon the supposed state of facts pronounces a judgment of incompetency, and no answer of the jurors could obviate the rule of law. In Coke upon Littleton, 158, b., it is said: "If the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined on his oath, but in other cases he shall be examined on his oath to inform the triers." And since the trial of Cooke for treason in the reign of William III., 13 State Trials, Howell's Ed., pp. 312, 234, *et seq.*, it has been, I think, uniformly held, when the question has been made, that if the question disparage the juror, he ought not be asked it. either upon oath or otherwise. While, therefore, we hold that (276) the answers could not have affected the result, we take occasion to disapprove of such a course of inquiry. Answers to such questions, in the great majority of cases, will not be likely to afford reliable information as to the true state of the juror's feelings.

The Court is of opinion, therefore, (1) That the cause of challenge assigned is cause of principal challenge, and that the Court can take cognizance of and review the same. (2) That the jurors challenged were under a legal bias, by reason of having decided the case of *Good-*

man v. Harris, and that the challenges ought, therefore, to have been sustained and the jurors withdrawn.

This will entitle the plaintiff to a *venire de novo,* and we abstain from going into an examination of the questions of evidence raised upon the record.

PER CURIAM. *Venire de novo.*

A. S. MERRIMON, SOLICITOR, ETC., ON RELATION OF ELIJAH HERBERT, v. WILLIAM M. SANDERSON AND OTHERS.

(1 Winst., 282.)

Where commissioners are appointed by an act of Assembly to "select and determine a site for the permanent seat of justice" in a county, and are directed, when they have selected a site, to give notice thereof to other commissioners appointed by the same act, for the purpose of acquiring title to the site selected, the commissioners for location may make a conditional selection; and if the condition be broken by the owner of the land selected as the site, the commissioners may make a new selection.

This was a writ of *Mandamus* at the suit of the solicitor of the Seventh Judicial Circuit, on the relation of Elijah Herbert, against the defendants, commanding them to procure a conveyance to the chairman of the county court of Clay County of a tract of land which had been selected, as the writ supposed, by the commissioners appointed for that purpose, for the county site of that county, or to show cause at the next term.

The affidavit of the relator stated that the county of Clay was established by an act of the General Assembly at the session of 1860-61, and that certain persons, naming them, citizens of Cherokee County, were appointed commissioners to "select and determine a site for the permanent seat of justice for said county," and a majority of them were empowered to perform any duty imposed on them by the act. The act directed that when these commissioners had, in pursuance of its provisions, located the seat of justice, it should be the duty of the defendants, or a majority of them, to buy or receive, by donation, a tract of land for the county of Clay, consisting of not less than 25 acres, to be

(278) conveyed to the chairman of the county court and his successors in office, to be held by him and them for the use and benefit of the county. The relator further stated that in April, 1861, a majority of the commissioners first named in the act assembled in the

locate a site for the permanent seat of justice on the lands of James Coleman; that they "staked off" and "marked out" the site on James Coleman's land, and made a written report of their proceedings, signed it and read it to the people assembled at the place so selected, and then delivered their report to the commissioners, named in the scond place in the act, to wit, the defendants; that James Coleman proposed to the commissioners, for locating the site, to give 25 acres of land for the use of the county, at the place and on the site established by them; that the relator proposed to give, in addition to the 25 acres, 15 acres of his own land, adjoining the 25, and that Robert B. Chambers proposed to give 15 acres of his land, adjoining the 25 acres; and that Coleman, Chambers, and the relator *are willing and ready now,* and at all times, to convey said lands according to the provisions of the act.

Four of the defendants, William M. Sanderson, Ezekiel Brown, John H. Johnson, and George Bristol, being the majority of the commissioners appointed to acquire title to the county site, make a return stating that the majority of the commissioners appointed to select a site selected therefor "a tract of land belonging to James Coleman, upon the following conditions, to wit: that said Coleman should give 25 acres of land selected for said site to the county for the town site, with the liberty to reserve one choice lot, and that R. B. Chambers was to give 15 acres of land, 'convenient and adjoining' the land so conditionally selected for a site as aforesaid, and the relator, E. Herbert, was to give 15 acres of land also 'convenient and adjoining the 25 acres to be given by Coleman' "; that upon receiving the report of the first named commissioners as to the selection of a site, they, together with Coleman (279) and Chambers, had a form of a deed prepared proper for conveying the said 25 acres to the chairman of the county court, and offered said writing to Coleman to be executed by him as his deed; Coleman refused to execute that deed, and refused to convey any land for a county site, except upon condition to be expressed in the deed, that the estate conveyed by it should cease and determine in case any spirituous liquors should be sold upon any of the lots in the proposed town. The return sets out with particularity the refusal of Chambers and the relator to convey the 15 acres which each had promised to give, and goes on to state that these defendants gave notice to the commissioners for selection of a site of the refusal of Coleman, Herbert, and the relator to convey, as they had promised, and thereupon the commissioners for selection did "select and determine" a site on the lands of William Hancock, and gave notice thereof to these defendants, who procured from Hancock a deed of conveyance according to the act of Assembly, and reported what they had done to the county court; and the county court directed a tem-

porary courthouse to be built, in which the court has been held since its completion, and the lots for the public offices have been designated, and other lots have been sold to individuals.

The plaintiff demurred to the return, and the defendant joined in demurrer.

Merrimon, Solicitor, in proper person.
No counsel for defendant.

MANLY, J. Upon the coming in of the answer to this writ, there was a demurrer and joinder in demurrer, so that the question brought here is upon the sufficiency of the answer. Its sufficiency depends upon (280) whether the commissioners had authority to make a conditional location; for if so, it seems to us their power would not be exhausted by such action, but, upon the nonperformance of the condition, might be resumed as an unfinished work; and so, *toties quoties,* until a seat of justice was finally provided.

The power of commissioners in such cases should receive a practical construction, such as will meet emergencies likely to arise in the transaction of such business. It is of the nature of such a duty that it may meet with obstacles in the course of its performance, and the commissioners be obliged to retrace their steps, and try again in some other place and with some other parties.

This was more probable, as a different class of commissioners are appointed to fix the site and to acquire it. While the Legislature might not have been able to foresee the absurd stipulations which did prevent the first attempt to locate, they must have been able to anticipate other similar obstacles, and when they provided two sets of commissioners, it could not have been intended that the designation of a place by the first, which is all they had to do, would fix it there irrevocably, and the commissioners of the second class would be obliged to make the purchase, whatever bad faith, imposition, or other obstacle the proprietor of the land might interpose, unless the Legislature should convene in time to afford relief.

It must have been intended that the two classes of commissioners should act in concert, and, in our opinion, it was not necessary that one set should exhaust its power before the other could be called upon to move.

It was entirely competent and proper for the one set to say, "Here is a proper site for the town, provided the other set can procure a surrender of the title in fee, and provided suitable town commons can also be procured." And upon a report back, that such titles could not be (281) had, the first commissioners could resume a duty not entirely or

absolutely completed, and perfect it. This reasoning, it seems to us, is analogous to that in *Caldwell v. Justices,* 57 N. C., 323, on which this Court was conducted to a similar conclusion.

All provisions of law for the accomplishment of an object should be so construed and executed as to accomplish it, notwithstanding such obstacles and opposition as may be naturally expected to arise out of such affairs.

The report of the first class of commissioners as to the location is referred to in the answer, and speaks of the donation of lands by Coleman, Chambers, and Herbert as *understandings* had with them, while the answer calls them *conditions.* We do not think this variance materially affects the case. The words in connection with such a negotiation were probably considered synonymous. They seem to have been so treated by the defendants, and no complaint is made of such construction.

From the nature of the transaction, it must have been that the grants of land were to be concurrent, at least, with the final act of the commissioners declaring the site fixed and their duty accomplished. A different construction would lead to the altogether inadmissible conclusion that the Legislature intended to fix the site irrevocably, and leave the public, in the acquisition of it, to such exactions as the cupidity, whim, or folly of owners might suggest.

Supposing the commissioners to select the site had a right to designate a place conditionally, there can be no redress under the present information. The conditions not being complied with, the commissioners have proceeded to select another place. The title has been acquired, temporary public buildings erected, the lands divided out into lots and sold, and the municipal machinery of the county put into action. According to what is said in *Hill v. Bonner,* 44 N. C., 257, the Court cannot revise the *discretion* of the commissioners. It may be conceded that they ought to have selected the lot on Coleman's land, (282) but not having done so, and having passed on and made a different selection, the writ will not lie, because it would be but a command to make a different selection from the one which they had thought proper to adopt.

Upon the whole, we are of opinion that the commissioners to select a site for the public buildings for the county of Clay could make a conditional selection without exhausting their power; and, upon the nonfulfillment of the condition, might resume the power and make another selection; and that a writ of mandamus, therefore, will not lie against the commissioners appointed to acquire title, commanding them to take a title to the place provisionally selected, although the owner may be now willing to waive former impediments.

The answer is held to be sufficient. The demurrer is overruled and the information quashed.

Each party is to pay his own costs.

Cited: Barnes v. Comrs., 135 N. C., 38.

A. J. LLOYD v. ALVIS DURHAM.

(1 Winst., 288.)

1. If an article of property laid off to a housekeeper by freeholders be exchanged for another article, the article received in exchange is not exempt from execution.

2. It *seems* that the debtor might have procured the article received in exchange to be laid off to him by a second allotment, and then it would have been exempt.

ACTION of trover, tried before *Heath, J.,* at Fall Term, 1863, of ORANGE.

The plaintiff proved that in 1859 he was the owner of a gray mare, which was laid off to him as a housekeeper, by freeholders acting (283) under the provisions of the Revised Code, ch. 45, secs. 8 and 9, and that a list of the property so laid off, including the mare, valued therein at $35.75, was made out and returned to the clerk of the county court, and that within a few weeks thereafter he exchanged the gray mare for a sorrel mare, being the one concerning which this suit was brought.

The defendant proved that he had purchased the mare at a sale made under a judgment and execution against the plaintiff.

The judge reserved the question of law as to the exemption of the mare from execution, and under his instructions the jury found a verdict for the plaintiff. The judge being of opinion with the plaintiff on the question of law reserved, gave judgment according to the verdict, and the defendant appealed.

Graham for plaintiff.
Phillips for defendant.

PEARSON, C. J. The plaintiff had a right to exchange the gray mare, and the effect of the exchange was to vest in him the title to the sorrel mare; so she was his property; but the question is, Was she protected from execution?

The plaintiff insists that as the gray mare was exempted, the privilege passed to the sorrel mare by the legal effect of the exchange; but the defendant insists that the privilege was personal to the gray, and did not attach to the sorrel.

The statute makes void any alienation of exempted property by the debtor, for the payment of his debts. He can sell or exchange it, but there is no provision that the article received in exchange shall be exempted from execution, and we see no ground upon which it is exempted by implication, as an effect of the exchange. On the contrary, we are of opinion that, by a proper construction of the statute, the sorrel mare was liable to execution as property acquired after the allotment.

We are led to this conclusion, in opposition to the opinion of his (284) Honor, by two considerations:

If the effect of the exchange was to communicate to the newly acquired article the quality of being exempted from execution, it would be liable to abuse, and tend to defeat the policy of the statute in respect to the provision that the "other property" not enumerated shall not exceed in value the sum of $50 at each valuation; for example, if the debtor should exchange the property allotted for other property of the value of *$100,* by undertaking to pay the difference in cash or some other way, and the newly acquired property should be exempt from execution, the policy of the statute is defeated at once; but it would not stop there. If the property received on the first exchange acquired the quality of being exempt from execution, the same quality would be communicated to property received upon a second exchange, and thus the debtor would become an independent trader with privileged property *ad infinitum.* So, if a mare can be exchanged for a mare, she may be exchanged for a house, or for cattle, or a negro, or for land, and the same principle would apply. Thus any species of property acquired by exchange would be exempted from execution. In short, the courts can fix no limit to the number of exchanges or the kind of property. In this instance it was the *first* exchange—a mare for a mare—and we take it there was but little difference in value, and it may be, as suggested by Mr. Graham, that the motive was simply to exchange a young gray mare, which the man's children could not work, for a sorrel mare, which was steady and well broke; and if the Court had power to grant this indulgence to debtors, it would be disposed to do so in this case, but "hard cases are the quicksands of the law." The Court has no power to add to a statute; that is the province of the makers of the law; they can, if it be deemed expedient, allow this indulgence and fix a limit to it, so as to (285) guard against abuse.

There is another view of the subject. The statute requires a descriptive list of the several articles exempted to be made out and filed among

the records of the office of the clerk of the county court. The object of this provision is to enable officers having executions in their hands to know with certainty what property was exempted. *Dean v. King,* 35 N. C., 20. This object would be entirely defeated if property received in exchange is also exempted. For it would put on an officer, who finds the debtor in possession of property not specified in the list, the responsibility of deciding whether it had been acquired by exchanges, which may have run through four or five stages. If he errs on one side, he is liable to the debtor; if on the other, he is liable to the creditor! It is not in the power of the Court to obviate this difficulty. The Legislature may do so, if it be deemed expedient to allow the debtor to exchange, by requiring the debtor to have the property, received in exchange, to be entered upon the list in place of the other, so as to give it the same "ear-mark" for the information of all concerned. And it was in the power of the debtor to accomplish the same end by having a second allotment, and a new list made out and filed, after the other property was acquired; and in that way both purposes of the statute would have been carried out. The value could not exceed $50, and the "ear-mark" would have been put on the property. It was the debtor's misfortune that he neglected to have a second allotment.

PER CURIAM. Error.

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(286)

DANIEL JOHNSON AND W. A. BUIE, EXECUTORS OF DUNCAN JOHNSON, v. ALEXANDER MURCHISON.

(1 Winst., 292.)

1. Where a witness who had an interest in a cause gives or accepts a release in order to extinguish his interest, which expresses to be given in consideration of a sum of money named therein, it is competent for the other party to ask him whether there was in fact any consideration.

2. A deed absolute on its face, which is intended to operate as a mortgage, is void in law as against creditors.

3. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them.

4. A. and B. were partners in trade in 1851 and 1852; an account is taken in 1857, by which a balance is ascertained to be due to B. In 1855 A. conveys his property to C. without a valuable consideration; the conveyance is void as to B., for he was a creditor of A. from 1852.

5. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation.

6. A conveyance of property, absolute on its face, and declared to be made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened and may never happen.

ACTION for trover, for the conversion of two slaves by the defendant, tried before *French, J.*, at Fall Term, 1863, of MOORE.

On the trial it was in evidence on the part of the plaintiff that (287) on 7 May, 1855, one Samuel E. Johnson, being in the possession of two slaves named Nat and Charles, conveyed them and other slaves, by his deed, bearing said date and registered January, 1856, to his brother, Duncan Johnson, the plaintiff's testator, in consideration of $2,789.43. About 1 January, 1858, the said slaves, being in possession of plaintiffs as executors of Duncan Johnson, were seized by the sheriff of Moore, and at January Term, 1858, sold under execution, when the defendant became the purchaser, who, on demand made by plaintiffs, refused to give them up.

On the part of defendant, Robert Belden testified that in September, 1857, he was called upon to make a settlement between Samuel E. Johnson, the bargainor, and the defendant; that they had been partners in trade in 1851, and the latter year the partnership was dissolved. Upon the settlement it was ascertained that Samuel E. Johnson was indebted to the defendant about $2,200. The defendant then gave in evidence a judgment for the debt, execution levied on the slaves, a sale and purchase by him in January, 1858.

Upon the part of the plaintiff, Samuel E. Johnson was offered as a witness. He was objected to by the defendant, on the ground that he was a legatee of his brother, Duncan Johnson. Plaintiffs then gave in evidence a deed from Samuel E. Johnson to his brother, Malcolm, dated 3 October, 1857, and registered in 1861, conveying all his interest under his brother Duncan's will, in consideration of $1,100. Defendant then proved that the mother of Samuel E. Johnson was a legatee under the will, and that she was dead intestate. Plaintiffs then gave in evidence a release of his interest as one of the next of kin of his mother for the consideration of $50. Defendant insisted that the witness was still incompetent, on account of his interest in the costs of this suit, whereupon the plaintiff gave in evidence a release from them to (288) the witness of his liability for the costs in consideration of $50.

The witness then testified that on 9 May, 1855, he was justly indebted to his brother, Duncan, in the sum of $1,500 by note, dated 28 August, 1849, in three other notes dated 12 June, 1852, 1853, 1854, for $150 each, payable to Duncan Johnson, and in the further sum of about $260, due by notes executed by him in 1849 and 1852, in favor of one Duncan Morrison, which were held by his brother, Duncan. He conveyed

Charles and Nat, and the other slaves, in order to pay these debts. Of these debts, the note for $1,500 was to secure the payment of that amount of money, which he owed Duncan for work done for him; the three notes for $150 each were given to secure the payment of the hire of a negro from his brother, Duncan, for three years, and the debt for $260, or thereabouts, accrued in this way: Duncan Morrison was the creditor of the witness for that sum, he was uneasy about the debt, and desired that it should be either paid or secured, and a note was made to secure it, payable to Duncan Morrison, and executed by Buie, one of the plaintiffs, as principal, and the witness and Duncan Johnson as sureties, and the witness's old notes to Morrison were delivered to W. A. Buie. This witness was asked by defendant's counsel whether, when he executed the release for his mother's interest, expressed to be in consideration of $50, he had received that or any other sum, and whether he had paid anything as a consideration for the plaintiff's release of his liability for costs. These questions were objected to by the plaintiff's counsel, and the objection overruled by the court. The witness answered that he received nothing in the one case, for he thought his mother had no interest, having sold it, and he paid nothing in the other. It was proved that Samuel E. Johnson was embarrassed and in failing circumstances in 1854 and 1855.

(289) The counsel for the defendant contended that so much of the consideration for the conveyance of Nat and Charles from Samuel E. Johnson to Duncan Johnson as related to the notes from Samuel E. Johnson to Duncan Morrison, viz., $260, or thereabouts, was feigned and covinous between Samuel E. Johnson and Duncan Johnson. The plaintiff's counsel contended that W. A. Buie, when he gave his note with Samuel E. and Duncan Johnson as sureties, received and held the Morrison notes as an indemnity.

The court charged the jury that if they believed the witness Samuel E. Johnson, the plaintiffs were entitled to recover; that if Buie held the Morrison notes as an indemnity, as contended by the plaintiff's counsel, and Duncan Johnson held them in the same way, then the deed, being absolute on its face, was void, and the plaintiffs could not recover; that the debts which were due from Samuel E. Johnson to Duncan Johnson formed the consideration of the bill of sale, and the intention of the conveyance is to accomplish the object which moved the maker to execute it, and if any part of the consideration be feigned or fraudulent, the intent is so, and the whole deed is void. The counsel for the plaintiffs requested the court to charge the jury, there being no account stated between Murchison and Samuel E. Johnson as partners in May, 1855, no debt ascertained to be due to Murchison, and no evidence that the deed was made to defraud Murchison, that the deed was not fraudulent

in law as to him. The court declined to give the instruction, and the plaintiffs excepted. The counsel for the plaintiffs asked for further instruction, "that although Duncan Johnson might not indeed be able to collect the Morrison notes from Samuel E. Johnson, yet if Samuel E. Johnson thought so, and took them in good faith in part consideration of the negroes in the bill of sale, the bill of sale would not be void as to creditors on that account." The court declined to give such instruction, and the plaintiffs excepted.

No counsel for defendant. (290)
Buxton for plaintiffs.

MANLY, J. The exceptions to the trial below which appear upon the record may be disposed of in the order in which they stand.

During the examination of Samuel E. Johnson as a witness on behalf of plaintiffs he was asked whether certain releases, which he had given to qualify himself, were not, in truth, without any consideration. This was objected to by plaintiffs, but allowed by the court, and answered in the affirmative.

The case does not disclose for what purpose this was used in the argument, or whether it was used for any purpose. We should take it for granted, therefore, that it was applied only to such uses as were proper, if there be any such.

There is one point of view in which, however little it may of itself weigh, it would nevertheless be proper to consider it, and that is in respect to the feelings and relations of the witness to the parties respectively, and the consequent bias under which he might be disposed to testify. The subsequent explanation which the witness gives of his estimate of these considerations makes the testimony of little or no significance, and we suppose it could not have influenced the verdict. We see no wrong that it can have done the plaintiffs, and it is not therefore a just ground of exception.

The second exception arises upon the charge of the judge, and is to that part of it in which he instructs the jury, "that if Buie held the Morrison notes as suggested by plaintiff's counsel, and Duncan Johnson held them in the same way, then the deed, being absolute on its face, was void." This instruction appears to be justified by the facts and the law of the land as settled in this Court in *Halcombe v. Ray,* 23 N. C., 340. It seems that Samuel E. Johnson was indebted to (291) Morrison by several notes, and being unable to pay them on demand, it was arranged, in order to quiet Morrison's apprehensions, that Buie should become the principal in a note to him for the amount, with the uncles, Samuel E. and Duncan Johnson, as sureties. Upon this arrangement the notes of Samuel E. Johnson to Morrison were left in

the hands of Buie, with what precise understanding does not appear; and the obvious inference might well be made that they were left there to abide the result of Buie's liability for the debtor, and an indemnity in case of loss; and, therefore, in respect to that part of the consideration, the deed from Samuel E. to Duncan Johnson was a mere security for debt. In other words, the deed in question was a mortgage. The court was justified in presenting the case to the jury on this hypothesis, and the law, we think, was properly declared. The principle that makes void a deed, which is absolute on its face, but intended to operate as a mortgage only, springs from the requirements of our registration laws. To hold otherwise would defeat entirely the objects of the Legislature in requiring mortgages to be registered before taking effect. These laws for registration were passed to provide for creditors such means of knowledge as would enable them to avail themselves promptly of the remedies the law provides.

If an absolute deed could be substituted and upheld, it would enable the debtor to baffle the creditor in pursuit of his just demands, and the latter would be in the same condition as if no law for the registration of mortgages had ever been passed. We are obliged, therefore, to hold such a deed void, in order to give effect to the repeatedly declared will of the Legislature. There is no error in the instruction of the judge on this point.

The third exception is to that part of the charge in which the jury are told "that the debts which were due from Samuel E. Johnson to
(292) Duncan Johnson formed the consideration of the bill of sale, and the intention of the conveyance is to accomplish the object that moved the maker to execute it; and if any part of the consideration be feigned or fraudulent, the intent is so, and the whole deed is void." This is in strict conformity to the law as laid down by this Court in *Stone v. Marshall,* 52 N. C., 300, when this Court announced the same principle in about the same words. The Court is now satisfied with the soundness of this view.

The fourth exception is to the refusal on the part of the court to charge the jury "that, as there was no account stated between Samuel E. Johnson and Murchison in May, 1855, and no debt ascertained to be due Murchison at that time, and no evidence that the deed was made to defraud Murchison, the deed was not fraudulent in law as to him." In asking for the instruction, it seems to be assumed that Murchison was not a creditor to be defrauded until after the balance was struck in his favor in 1857. This is manifestly wrong. The testimony discloses the fact that the settlement spoken of was solely in relation to partnership transactions in the years 1851 and 1852. So that the balance, ascertained to be due in 1857, and for which judgment was recovered in that

year, had been due since 1852. It would, therefore, have been manifestly improper for the judge to predicate any part of his charge on such an assumption, and he was right in refusing the specific instructions asked.

The last and only remaining exceptions of the appellant is to the refusal of the court to give this instruction, "That although Duncan Johnson might not, in strict law, be able to collect the Morrison notes out of Samuel E. Johnson, yet, if Samuel E. Johnson thought so, and took them in good faith, in part consideration of the bill of sale, the bill of sale would not be void as to creditors on that account." This instruction was properly refused. The note not being due and col- (293) lectible by Duncan Johnson, which is the supposition made, it follows it could only be held by him as a collateral security against his liability for the maker; and we have already seen that such a consideration cannot support an absolute deed so as to defeat a creditor. The claim or demand is a contingent and not an absolute one. The event may never happen upon which a legal demand would arise, and to estimate the value of such a risk, and insert it as a consideration in a deed absolute upon its face, is a fraud in law upon creditors. The necessary intendment of such an instrument is to defraud, and it is the duty of the court so to hold, irrespective of any special evidence of the mind or intent of the maker.

Upon the whole, we see no error upon the trial of this case in the court below, and, therefore, it is considered by us that the judgment be affirmed.

PER CURIAM. No error.

Overruled: Woodruff v. Bowles, 104 N. C., 207.

THE STATE v. SAM.

(1 Winst., 300.)

An infant under the age of 14 years cannot commit the crime of rape, nor be guilty of an assault with intent to commit rape.

INDICTMENT against a slave, tried before *Osborne, J.,* at Spring (294) Term, 1864, of DAVIE.

The indictment contained three counts. The first, for carnally knowing and abusing a female child under the age of 10 years. The second, for assault on a white woman with intent to commit a rape. The third, for an assault on a white female under the age of 10 years with intent to carnally know and abuse her.

The jury found the prisoner not guilty on the first count; and they found specially "that the prisoner made an assault on the body of Camilla Ann Brock, with an intent, forcibly and against her will, carnally to know her, the said Camilla. That the said Camilla Ann was of the age of 4 years at the time of said assault, and that the prisoner was under 14 years of age; the jury further find that there was an emission of seed from the person of the prisoner, which was found on the undergarment of the said Camilla. Whether the defendant be guilty," etc.

The court gave judgment for the prisoner, and the State appealed.

Winston, Sr., for the State.
Boyden for prisoner.

MANLY, J. The question brought up in this case for review is whether a person of color, under 14 years of age, can be convicted of an assault with intent to commit a rape.

By the provisions of the Rev. Code, ch. 107, sec. 44, and ch. 34, sec. 5, the offense charged in the bill of indictment is declared to be a capital felony, and is therefore entitled to be considered under the safeguards which the law has thought proper to throw around human life.

By the common law persons between the ages of 7 and 14 may be convicted of most offenses if, added to the proof of the *corpus delicti,* there be proof also of the mischievous mind. There is a legal presump-
(295) tion that such persons are *doli incapaces;* but it is a rebuttable presumption.

It is not so in respect to the crime of rape. The presumption against its commission by persons below the age of puberty (14) is irrebuttable. This is not so much on the ground of incapacity of mind or will, but of physical impotency. It will follow as a plain legal deduction from this, that the person under 14 cannot commit an assault with intent to commit a rape. It is a logical solecism to say that a person can intend to do what he is physically impotent to do.

These principles are supported by the following authorities: Arch. Cr. Pr., 3; 3 Chitty Cr. Law, 811; *Rex v. Eldershaw,* 14 Eng. Com. Law, 336, and *Regina v. Phillips,* 34 Eng. Com. Law, 763.

The courts of two of the States north of us have held convictions for "assaults with intent" right, when the persons were under 14. But it is noticeable that the offense in these States is a misdemeanor. In the one case there was a divided Court, and in the other the common-law principles, as here laid down, were recognized; but the Court undertook to alter them to suit the altered temperament of the population. These do not at all affect the stability of the law as now expounded. With the ex-

ceptions noticed, it has been uniform, we think, in all the settlements of the continent which have adopted the common law of England.

By a proper consideration of principles, it will be seen why the fact found by the jury, that there was an emission of seed from the person of the prisoner, does not materially affect the case. The presumption which arises from want of age applies equally to the offense of rape and the offense of assault with intent to commit it. Both presumptions are alike irrebuttable. *S. v. Pugh,* 52 N. C., 61, recognizes the distinction here made. So far from impugning, it is decided strictly in accordance with them.

A large portion of our population is of races from more (296) southern latitudes than that from which our common law comes. We have indeed an element of great importance from the torrid zone of Africa. It is unquestionable that climate, food, clothing and the like have a great influence in hastening physical development. Whether it may not be advisable to move down to an earlier age than 14 the period of puberty, for a portion if not for all the elements in our population, may be a proper inquiry for the statesman. The courts declare the law as it stands. The legislative body will inquire whether the exigencies of the age require change.

The judgment of the Superior Court is

PER CURIAM. Affirmed.

STATE v. NORTON.

(1 Winst., 303.)

1. When a question arises on a jury trial concerning the competency of a witness, and the parties disagree about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which, in his opinion, the evidence proves, this Court cannot revise his decision.

2. In such case the prisoner is entitled to a *venire de novo.*

INDICTMENT for murder, tried before *Osborne, J.,* at Fall Term, (297) 1863, of RICHMOND.

The defendant was indicted for the murder of one Angus Campbell.

The solicitor for the State proposed to examine one Woodel as a witness, but it was objected to by the prisoner that he was of negro blood within the prohibited degree, which being proved, the solicitor replied that the prisoner was also of negro blood, and to establish this fact introduced a witness by the name of McNeill, who said he knew the father and grandmother of the prisoner, and they were reputed to

be of negro blood; that the grandmother of the prisoner was very dark, and that he should suppose that she was at least one-fourth of negro blood; that he had no particular skill in telling the degree of negro blood from the complexion, was not an expert, and knew nothing of the subject except from general observation, and could not form an opinion from the complexion to be satisfactory. One Gibson also proved that the grandmother of the prisoner was reputed to be a mulatto; she was quite dark, but he did not know whether she was one-fourth negro blood or not. One Mrs. Huckaby testified that she knew the grandmother of the prisoner, whose maiden name was Brigman; that she was reputed to be a mulatto, was very dark, and must, from her complexion, have had a good deal of negro blood in her veins, but how much she was unable to say. Two witnesses examined by the prisoner testified that they knew the father of the prisoner; that he was reputed to be a white man, and was allowed to vote; the mother of the prisoner was a white woman from Scotland.

Upon this evidence the court held that the witness was competent, and he was examined.

The jury found the prisoner guilty.

Winston, Sr., for the State.
No counsel for defendant.

(298) PEARSON, C. J. On the argument, Mr. Winston assumed that the grandmother of the prisoner had one-*fourth* negro blood; from this he inferred that one of his great-grandparents had one-*half* negro blood, and one of his great-great-grandparents was full negro; and insisted, from this fact, that the prisoner was of mixed blood within the meaning of the statute, and, consequently, that negro testimony was competent on his trial.

The record does not present the question; it is not found as a fact that "the grandmother of the prisoner had one-fourth negro blood."

His Honor, in making a statement of the case, sets out all the evidence, and his conclusion, as a matter of law, that "upon this testimony the witness was competent." But he does not find or set out the fact or facts upon which this conclusion is based. In other words, he did not have his attention called to the difference between "the evidence" and the fact or facts established by the evidence. So the case comes up in such a condition that this Court cannot revise his decision as to the law, because we do not know upon what state of facts he formed his opinion. It is the province of the jury to pass on the issues joined by the pleadings; but when a collateral question arises, as in this instance, it is the province of the judge to decide the questions of fact as well as of law, and the record should state the facts found by the judge, as well as his

conclusion as to the law arising on that state of facts, so as to put it in the power of this Court to review his opinion as to the law. *S. v. Goodwin,* 27 N. C., 401. It may be, when the evidence is clear, and there is no conflict, so that, if the case was for the jury, the judge would be at liberty to charge, "if you believe the witnesses, you will find for the plaintiff," it would be sufficient for the judge merely to set out the evidence. But when, as in this instance, the testimony is not clear, and the witnesses on behalf of the State can only give matter of opinion and conjecture, which is unsatisfactory even to the witnesses (299) themselves, and there is conflicting testimony offered on the part of the prisoner, it is necessary for the judge to state his conclusions as to the facts.

For the sake of illustration: a special verdict, instead of finding the *facts,* merely sets out the *evidence,* which is unsatisfactory and conflicting. The judge cannot decide the law, for there is no question of law presented; and if he does undertake to do it, this Court cannot review his decision, for it cannot be known upon what state of facts he based his opinion. Such is our case. The question is, Must the prisoner be prejudiced, and lose his right to have the opinion of the judge reviewed by this Court, or should there be a *venire de novo?*

The general rule is, judgment must be affirmed unless error appears; and it is the misfortune of the appellant if by reason of an omission in making up the statement of the case the point on which he relies is not presented. We are satisfied, however, that this case does not fall under the general rule. There is a defect, not in the statement of the case, but in the record proper, in this, that it does not show the facts on which the court decided the law. The illustration drawn from a special verdict makes the matter and the distinction very clear. Suppose a special verdict sets out the evidence, and does not find any fact, and the court gives judgment: clearly there is error in the face of the record, and the judgment would be arrested, for there is "no verdict" or finding of the facts by the jury.

In our case there is the same error; the judge does not find the facts.

As the matter relates to a collateral issue, touching the competency of a witness, its effect is to entitle the prisoner to a

PER CURIAM. *Venire de novo.* (300)

NOTE.—In the transcript of the record in this cause, as well in the record proper and in the case stated by the judge, the word "defendant" was used instead of "prisoner." The court ordered the clerk to strike out the first mentioned word wherever it occurred, and insert "prisoner." The same order was made as to the transcript of the record in other capital cases, where the like mistake had been made, and the clerk corrected the record accordingly. *Vide S. v. Ellick, post,* 457; *S. v. Summey, post,* 499; *Gaither v. Ferebee, post,* 310.

Cited: Gaither v. Ferebee, post, 310; *S. v. Ellick, post,* 457; *S. v. Summey, post,* 499; *S. v. Secrest,* 80 N. C., 456; *S. v. Jones,* 87 N. C., 556; *S. v. Crumpler,* 88 N. C., 649; *Branton v. O'Brient,* 93 N. C., 104; *Smith v. Kron,* 96 N. C., 397; *Leak v. Covington,* 99 N. C., 564.

STATE v. JAMES LEWIS.

(1 Winst., 307.)

1. An admission by a defendant, indicted under the act of 1863, for "aiding, assisting, harboring, and maintaining" a deserter, that the person so aided, etc., belonged to Captain Galloway's company in the army, that he had been at defendant's house two or three weeks, and defendant believed that he was absent from the army without leave, in the absence of all other proof, is not competent evidence that the person aided, etc., is a soldier in the army of the Confederate States, or that he is a deserter.

2. Whether an indictment under that act must not aver that the person aided, etc., is a soldier in the army of the Confederate States, as well as that he is a deserter, *Quere.*

INDICTMENT, tried at Spring Term, 1864, of ROCKINGHAM, before *Howard, J.*

The indictment charged that "James Lewis, laborer, late of the county of Rockingham, on the first day of August, one thousand eight hundred and sixty-three, and at divers other times, etc., with force and arms, at the county aforesaid, did knowingly aid, assist, harbor, and maintain one L. G. Lewis, a deserter from the military service of the Confederate States of America, he, the said James Lewis, then and there, well knowing the said L. G. Lewis to be a deserter as aforesaid, against the form of the statute in such case made and provided, etc."

(301) The witness for the State testified that he arrested L. G. Lewis, a son of the defendant, whom the defendant is charged in the bill of indictment to have harbored; that the defendant, in a conversation with witness, told him that L. G. Lewis belonged to Captain Galloway's company, in the army; that L. G. Lewis had been at defendant's house two or three weeks, and that defendant believed that L. G. Lewis was absent from the army without leave. This evidence was objected to by the defendant's counsel, but left to the jury by the court, and the jury found the defendant guilty.

Winston, Sr., for the State.
Fowle for defendant.

PEARSON, C. J. The statement of the case made by his Honor is very short. It sets out the testimony of one witness only, and we take it from the words, "the witness for the State testified," etc., that he was the only witness, and that his testimony was all the evidence in the case. So the evidence is this: The witness arrested L. G. Lewis, who is a son of the defendant. In a conversation with the witness, the defendant told him his son, L. G. Lewis, belonged to Captain Galloway's company, in the army; had been at his house two or three weeks, and the defendant believed his son was absent from the army without leave.

We have no doubt that if the fact that L. G. Lewis was a soldier of the army of the Confederate States of America and the fact of his being a deserter had been established by competent proof, then the above admissions of the defendant would have been admissible in evidence, as tending to fix the defendant with the *scienter,* that is, with a knowledge of the fact that L. G. Lewis was a deserter. But we are clearly of opinion that the admissions do not amount to evidence to be (302) left to the jury, from which they were at liberty to infer that L. G. Lewis was a soldier of the army of the Confederate States, or that he was a deserter. "L. G. Lewis belonged to Captain Galloway's company!" Who is Captain Galloway? What army? The army of the Confederate States, or the State of North Carolina? In the language of *Judge Gaston,* "the jury must not be left to guess the facts." "He believed his son was absent from the army without leave!" "Desertion" is one thing, "absence without leave" is another. Every deserter is absent without leave; but every soldier who is absent without leave is not a deserter. These terms have a distinct meaning; a deserter is a soldier who *quits* the army without leave, and in violation of his duty, and wrongfully stays away. So he is in the wrong from the beginning. One who is permitted to leave the army, as by a furlough, and who afterwards stays away, either by reason of sickness or some accident or by design, is said to be "absent without leave." The two offenses are considered and treated as entirely different.

What we mean to decide is this: when the fact of desertion is proved, then an admission that the defendant believed the party was absent without leave is evidence from which the jury may infer that the defendant knew that the man was a deserter; but when the main fact, to wit, that the party is a soldier and that he is a deserter, is not proved by other evidence, then such an admission is no evidence that the man is a deserter, or that the defendant knew him to be a deserter, because the words do not in their ordinary and appropriate sense bear, and there is nothing to give them, a different signification.

What kind of evidence is necessary in order to prove the fact that a

man is a soldier or a deserter is a question which it is not necessary for the purposes of this decision to determine.

(303) Whether by a proper construction of the statute the "aiding, assisting, harboring, and maintaining" must be done *secretly* and *fraudulently*, with intent to enable the deserter to conceal himself and keep out of the way (which is the construction given to the words "harbor and maintain" in the statute concerning runaway slaves, *Dark v. Marsh*, 4 N. C., 249), was mooted at the bar, but the question is not presented by the case, and we intimate no opinion in regard to it.

This being the first indictment that has come up on a new statute, it may be proper to call the attention of the solicitors to the question whether the indictment should not contain an averment that the man "is a soldier," as well as the averment that he is a deserter.

PER CURIAM. Error.

JAMES W. GAITHER v. THOMAS FEREBEE AND OTHERS.

(1 Winst., 310.)

1. When evidence is direct, leaving nothing to inference, and, if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that if they believe the witness they may find for the plaintiff, or for the defendant.

2. But this is not allowed where the evidence is circumstantial, or where the evidence offered on the other side tends to explain it, or to rebut the inferences sought to be drawn from it, or to contradict the witness.

ACTION on the case, tried before *Bailey, J.*, at Fall Term, 1863, of DAVIE.

The suit was brought to recover damages from the defendants for so negligently using their machine for thrashing wheat that the plaintiff's wheat, which they were thrashing for hire, was burned and consumed.

The plaintiff proved that the defendants were employed to (304) thrash his wheat and Basil Gaither's wheat with a thrashing machine. The wheat was in separate parcels, the plaintiff being the owner of one parcel and his father, Basil, owner of the other; but the stacks were close together.

Thompson, a witness for the plaintiff, said he had been engaged in manufacturing thrashing machines and other machinery for many years, and had also been running a thrashing machine for the past twenty years, and that he had skill in machinery; that thrashing machines were liable to heat, and, if not attended to, to catch fire, and that such ma-

chinery ought to be frequently oiled to prevent it from burning; that it ought to be oiled from every hour to every half hour, and the purer the oil the better it is for that purpose; that lard was not suitable for oiling it, unless prepared by being dripped; that to prevent heating, much would depend upon the machinery being put down right, properly leveled and geared. If a thrashing machine was in proper condition, every way, and kept well oiled, it might safely be run all day without stopping, and that dirty grease was not proper for greasing thrashing machines.

Sheek said he had been making thrashing machines for several years, and had been a millwright for fifteen years, and was skilled in machinery; that thrashing machines were liable to heat from friction, and frequent oiling was necessary to prevent it. Oil was better than lard, and pure lard than dirty grease, for greasing machinery. That thrashing machines might heat in several parts, as about the cylinders and where the foot rested on planks.

Spry said he was a mechanic, and had experience in running a thrashing machine. A year before the plaintiff's wheat was burned he had opened defendant's thrashing machine and examined it to see (305) if it was worn; at that time the zinc or metal on which the cylinder rested was considerably worn, but not worn through; when worn through, even if new, it would heat.

Basil Gaither said that in the morning of the day when the wheat was burned the machine was put down before breakfast; he saw one of the defendants at the machine with the can in which the grease was, as if in the act of greasing the machine before it started; the machine started about an hour by sun, and very soon after starting the band broke, which was soon mended, and it started again and never stopped until about 11 o'clock, a. m. He never saw it greased after it started in the morning; he was superintending some of his hands, who were clearing up wheat near-by; that the defendant Etchison had three hands, besides himself, who attended to the horses and the machine, and the witness had twelve or thirteen hands, engaged in throwing wheat off the stacks and taking off and putting up the thrashed straw in a rick and clearing off the wheat and hauling it off. After stopping a short time, about 11 o'clock, the machine started again and ran until they all stopped work for dinner, about 12 o'clock. The thrashed straw was raked up and put in the rick before the hands went to dinner. George Gaither, who was hauling, brought word to him that dinner was ready; he did not at once tell defendants, but waited till George Gaither loaded his wagon with wheat, and then he told defendants dinner was ready, and he heard defendant Etchison tell the hand on the wheat stack to stop throwing down wheat; there was a considerable bulk of unthrashed wheat piled up against the

machine when they stopped for dinner. When the hands got word about dinner, George Gaither started his wagon to the house at a gallop, and some of defendant's hands went to water the horses, and witness and the hands clearing up wheat stayed while a person might have walked
(306) 50 or 60 yards, and then went to the house, and witness went into the whiskey house, when the alarm of fire was heard, and he made all speed he could to the thrashing yard; when he got there he found the machine burning, the bulk of wheat was burned up, and the fire was catching to the thrashed straw; he noticed the place where Latham had fire to heat the grease before he went to dinner, and thought the fire was out.

Taylor said he was in the house yard at Colonel Austin's plantation, and had just eaten his dinner, when he smelt something burning like dirty grease; he went into the loft; when he got up there, he had a good view of the thrashing yard at Basil Gaither's; he saw a small puff of smoke immediately, then a larger; the smoke arose near the wheat stack, and where he found the thrashing machine when he got to the thrashing yard. When he got there, he found the machine burning and sinking over to one side, the wheat stacks burning and catching to the rick. The machine was all burned but the horse-power and part of the shaker.

Griffith said Ed. Valentine was working at his house, and he saw him at dinner-time the day the wheat was burned, until 1 o'clock, 1½ miles from Basil Gaither's.

The case made by the judge sets out other evidence of the same character, introduced by the plaintiff.

James Latham, witness for defendant, said he was one of the hands employed to work the machine at Basil Gaither's; his principal business was feeding and oiling it. The burning occurred between 11 and 12 o'clock, as well as he recollects; was at the stables, when the alarm of fire was given, about a quarter of a mile from the thrashing yard; rode to the fire as quick as he could; when he got there the straw was all on fire—the shaker was on fire at the further end from the machine, but no other part of the machine, that he saw. The shaker was about 12 feet long; the machine caught very soon, and was burnt up very soon
(307) after. When he last oiled the machine, he greased it as usual, and examined it to see if the caps were right, and to remove the trash, if any; the machine was as cool as it ought to have been after running. When the machine first started that morning, fire was brought by him to the yard, for the purpose of warming the grease, that it might be poured into the can; he asked the plaintiff where the fire should be put, and by his direction the fire was put in a place about 20 steps from the machine, and about 20 or 25 from the nearest wheat; the wheat farthest from the fire was first burned. The fire was used for warming

the grease until 9 o'clock, or a little later; we used dirty grease; some of it was furnished by George Gaither and some was brought by defendants. The thrashing commenced about 8 o'clock, and continued three heats. It was in July; the machine was in good repair, one of the caps was lost, but a piece of leather was put in its place, which answered the same purpose; during the last heat the witness did not feed the machine, he greased it; the heats lasted about an hour each.

Naylor, another witness for defendants, said he had skill in machinery; he thought lard better than sperm oil for greasing machinery, and lard oil better than lard; lard, without being dripped, answered a good purpose.

Riley, another witness for defendants, heard the plaintiff say he believed an enemy had burned his wheat.

Griffith, defendant's witness, heard plaintiff say he believed Ed. Valentine had burned it.

Another witness for defendant said that the cylinder rested on some composition metal at its ends, and did not touch the wooden part of the machine by 2 or 3 inches; that he had run a thrashing machine, and, in his opinion, the machine commenced cooling from the time it stopped, and if it did not fire during the time the wagon was loaded with wheat, it would not fire after that.

Other evidence of the same general character was given by the (308) defendants.

The judge instructed the jury that if they were satisfied that the evidence offered on the part of the plaintiff was true, the defendants were guilty of negligence, and they should render a verdict for the plaintiff.

There was a verdict and judgment for the plaintiff, and the defendants appealed.

Clement for plaintiff.
Boyden and Winston, Sr., for defendants.

PEARSON, C. J. For the purpose of showing negligence on the part of the defendants, the plaintiff examined many witnesses, who stated facts and circumstances from which he insisted an inference might be drawn as to how the fire was caused, and fixing the defendants with negligence. To contradict this evidence, or to explain it and rebut the inferences which might be drawn from it, the defendants examined many witnesses, and the court instructed the jury, "that if they were satisfied that the evidence offered on the part of the plaintiff was true, the defendants were guilty of negligence, and they should find a verdict for the plaintiff. If they were not satisfied as to this, but believed the evidence offered by the defendants, they should find a verdict for the defendants." There was a verdict for the plaintiff.

There is error. The verdict must be set aside and a *venire de novo* awarded, on the ground that the judge in the court below has not pursued the statute in that case made and provided, and has left the case to the jury in such a manner as to make it impossible for this Court to know what his opinion was on the question of law arising on the facts of the case, and of course making it impossible to review his decision.

The statute requires the judge to "state, in a full and correct
(309) manner, the evidence given in the case, and *declare* and *explain the law arising thereon.*" Rev. Code, ch. 31, sec. 130.

It is not essential, by the true construction of this statute, that the judge shall recapitulate all of the evidence in detail. It is sufficient for him to call the attention of the jury to the material parts of it, and he is then to *declare* his opinion of the law arising thereon; that is, he is to charge what the law is on a given state of facts. For instance, he is to instruct the jury that in order to make out his case the plaintiff must establish by the evidence certain facts, or, in order to support his plea, the defendant must establish certain facts, and leave it to the jury to decide whether the evidence does or does not establish the facts necessary to sustain the action or the plea. In this way it is made to appear by the record what facts the jury find and what is the opinion of the judge as to the law arising thereon.

When the evidence is direct, so as to leave nothing to inference, and the evidence, if believed, is the same thing as *the fact* sought to be proved, the judge is at liberty to instruct the jury that, if they believe the witness, they should find for the plaintiff, or for the defendant; and this may be done even when many other witnesses are examined in support of the principal witness, or to contradict him. This mode of leaving a case to the jury is allowed in such cases because it is easy, and the main purpose is accomplished, viz., it shows what facts are found by the verdict and what is the opinion of the judge as to the law arising thereon; but this indulgence cannot be extended to cases like the one before us, where the evidence is altogether circumstantial, and that offered on the other side tends to explain it, or to rebut the inferences, or to contradict some of the witnesses, because the main purpose is not accomplished; the

judge does not "declare or explain the law to the jury," and there
(310) is no telling what facts the jury find, or what was the opinion of the judge on the questions of law arising thereon. So the decision cannot be reviewed, and the testimony is thrown broadcast to the jury, and they are to take the responsibility of making a final decision!

Suppose the jury should render a special verdict, not finding the fact, but setting out all the testimony, such as that offered in this case! Could the judge decide the case upon such a verdict? or if he did undertake to do it, would it be in the power of this Court to review his decision? Cer-

tainly not; for he cannot know what the facts are, nor can this Court know what he supposed them to be. This subject is discussed in an opinion delivered at this term (*S. v. Norton, ante,* 296), a reference to which will aid in its elucidation and show the distinction between the evidence in a case and the facts established by such evidence. Sometimes the difference is not so obvious, but in a case like the present it is glaring.

Venire de novo.

Cited: S. v. Ellick, post, 457; *S. v. Medlin, post,* 493; *S. v. Summey, post,* 499; *S. v. Horan,* 61 N. C., 575; *Hardin v. Murray,* 68 N. C., 536; *S. v. Jones,* 87 N. C., 556; *McQuay v. R. R.,* 109 N. C., 588; *Nelson v. Ins. Co.,* 120 N. C., 305; *Williams v. R. R.,* 130 N. C., 120; *Wetherington v. Williams,* 134 N. C., 280.

EDWARD S. WALTON v. T. H. GATLIN.

(1 Winst., 318.)

1. Where the object of a writ of *habeas corpus* is to inquire whether there be probable cause for commitment, the decision on it is not the subject of review by writ of error or *certiorari.*

2. Where the question on a writ of *habeas corpus* is concerning the power of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review.

3. The decision on a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment,* and the subject of review by writ of error or *certiorari.*

4. The Supreme Court has the power to review the action of the Superior Courts, and the judges in vacation, upon questions of law in all cases under section 10 of the *Habeas Corpus Act.*

ON the first day of the term Messrs. Bragg and Strong, on be- (311) half of T. H. Gatlin, a captain in the army of the Confederate States, moved for a writ of *certiorari,* to be directed to the Honorable Richmond M. Pearson, Chief Justice of this Court, commanding him to certify, under his hand and seal, into this Court, the record of a writ of *habeas corpus* issued by him at the suit of Walton against Gatlin, and the proceedings thereon before the said Chief Justice, and his judgment thereon, suggesting that in the proceedings and judgment there was error in law to the injury of the said Gatlin.

It appeared that Walton had applied to Chief Justice Pearson, on 27 January, 1864, for a writ of *habeas corpus,* alleging that he had been

arrested and was detained in custody by T. H. Gatlin, a captain in the army of the Confederate States, as a person subject to serve as a conscript, he being legally exempt from such service. The writ was granted by the Chief Justice, returnable before himself, and was served on Captain Gatlin, who made a return thereon to the effect that Walton was liable to serve as a conscript under the act of Congress of 5 January, 1864. The Chief Justice decided, on 19 February, 1864, that Walton was not liable to service on the conscription acts, and discharged him; but on an intimation of the counsel who appeared on behalf of the Confederate States that he would move at the next term of the Supreme Court for a writ of *certiorari,* the Chief Justice bound Walton in a recognizance to appear in the Supreme Court on second Monday of next term.

The Court ordered the motion to stand over for argument on (312) the second Monday of the term, when it was argued by

Bragg, Strong, and Winston, Sr., in support.
Moore and Boyden against.

PEARSON, C. J. The motion on the part of the defendant for a *certiorari,* or other appropriate writ to bring up this case for review on the question of law. was opposed by the counsel of Walton on two grounds:

1. It was insisted that the action of a single judge in vacation, upon a writ of *habeas corpus,* is not the subject of review. The counsel relied on the authorities cited, and the reasoning of *Judge Kent,* in *Yates v. New York,* 6 Johnson, 397, and of *Judge Baldwin* in *Holmes v. Jennison,* 14 Peters. 614 (13 Curtis, 649).

These cases show that there is a conflict of decisions and a great contrariety of opinion on the question. Any one who reads them will become satisfied that the amount of talent and learning bestowed on the subject has tended to mystify rather than to elucidate it. When the stream becomes too muddy to see the bottom, the surest way to find truth is to go up to the fountain head, that is, "to the reason and sense of the thing." We believe the conflict and confusion found in the books in regard to this question are mainly to be attributed to the fact of not keeping in view the distinction between a *habeas corpus* "when one stands committed for a crime" and a *habeas corpus* when one is imprisoned or otherwise restrained of his liberty for some cause other than the commission of a criminal offense. This distinction is pointed out in *Caine's case. Judges Kent* and *Baldwin,* in the cases referred to, had their minds fixed upon the former class of cases, and do not advert to the distinction.

The object of a commitment is to secure the attendance of the party at the trial; and it is the duty of the committing magistrate to make

an examination, inquire into the circumstances, and to discharge (313) the person arrested, or remand him, or take security for his appearance, according to the nature of the offense and the degree of proof. This proceeding is not the subject of review by writ of error or *certiorari,* for the reason that there is no trial, and no judgment, but a mere inquiry, to see whether the person accused ought to be tried; indeed, when the law is duly administered, the trial will take place before a writ of error or *certiorari* could be disposed of in the course of the court. The courts, however, exercise a supervising jurisdiction over the action of the committing magistrate, by means of the writ of *habeas corpus,* and to inquire into the legality of the commitment and the question of probable cause. This proceeding is in lieu of a writ of error or *certiorari,* and is not the subject of review by either of those writs, when it turns on the question of probable cause, for, like the proceeding before a committing magistrate, it is not a trial; there is no judgment; it is a mere inquiry. When it turns on the power of commitment, or its legality, the question is not so clear. There is much force in the authorities cited, and in the reasoning of *Judges Kent* and *Baldwin,* although the weight of authority in this country is on the other side; for in *Yates v. New York* the decision is against the opinion of *Judge Kent.* In *Holmes v. Jennison* a majority of the judges differ from *Judge Baldwin,* and in the late case of *Ableman v. Booth,* 21 Howard, 506, the jurisdiction by writ of error is assumed by the Supreme Court of the United States, and the point seems to be conceded.

The superintending jurisdiction over committing magistrates was intrusted to the judges in vacation, 32 Charles II., ch. 2, Rev. Code, ch. 55, sec. 1.

The purpose of a writ of *habeas corpus,* where one "is restrained of his liberty for some cause other than the commission of a criminal offense," is altogether different. In ancient times, in such cases, the writ *de homine replegiando* was used. It was an original writ by which an action was instituted when a person was restrained of (314) his liberty, unless committed for a crime, and the right to the services and custody of the person was determined. Fitz. N. B., 68; Com. Dig. Pleader, 3 K. I., Imprisonment, L. 4; 2 Inst., 55; 3 Mod., 120. There can be no doubt that the judgment in this action was the subject of review by writ of error. This original writ is now superseded by the judicial writ of *habeas corpus,* as a more speedy and summary remedy, called for by the nature of the case, which the courts issued under their common-law jurisdiction. In the proceeding instituted by this writ the right in controversy is *determined by a judgment,* and no reason can be assigned why such judgment is not the subject of review in the same way as the judgment in the old action *de homine replegiando,*

or any other action or proceeding in which the court renders a judgment; because, thereby, the right of the parties is adjudicated and determined. It is true, if the plaintiff seeks for damages he must follow it up by an action of trespass for assault and battery, and false imprisonment, as the action of ejectment, which is substituted for the old real actions, is followed up by an action of trespass for mesne profits; but that is no reason why the judgment should not be the subject of review.

This jurisdiction is extended to the judges in vacation by 56 Geo. III. (1816), so the jurisdiction of a single judge in such cases is of very recent origin, which may, in some measure, account for the confusion in which the subject has been involved, by not distinguishing this class of cases from that of the case coming within the operation of the act of Charles II. The fact that so many writs of *habeas corpus* have been issued in the last two years has elicited a closer and more serious investigation of the nature and purposes of the proceeding in cases of this kind, and the result is a clearer apprehension of the distinction between the two classes of cases.

(315) The question is narrowed to this, Is not the judgment of a single judge, in the exercise of this jurisdiction, conferred by statute of George III., and our statute of 1836, subject to review for the same reasons and on the same grounds which are applicable to the judgment of the courts in the exercise of their common-law jurisdiction by *habeas corpus?* There are a suit, a trial, and a judgment, deciding the rights of the parties; and the fact of its being the decision of a tribunal composed of a single judge can furnish no reason why it should not be the subject of review by a higher tribunal. Certainly, the decision of a judge in vacation cannot be put on a higher footing than the decision of the same judge in term-time.

For illustration: *Zeigenfuss v. Hastings,* 24 N. C., 463, presented this question of law: Has a creditor the right to take the body of his debtor by writ of *capias ad satisfaciendum,* after the debtor has filed his petition in bankruptcy, and given notice, but before a decree of bankruptcy? The case was constituted before a single judge by a writ of *habeas corpus,* under section 10 of the act of 1836. The judge decided against the debtor. It was an adjudication of the rights of the parties.

So *Prue v. Hight,* 51 N. C., 265, instituted by writ of *habeas corpus,* before a single judge, presented a question of law as to the validity of indentures of apprenticeship on which the rights of the parties depended. The judge decided in favor of the defendant, and his right to the services of the plaintiff, as an apprentice, was thereby determined.

These cases show strikingly the difference between a *habeas corpus* under the first section of our statute, when one "stands committed for a

crime," which is a mere inquiry preliminary to his trial, and a *habeas corpus* under section 10, which is a suit involving the rights of the parties, and in which their rights are adjudicated and determined. In cases of this kind we think it clear the decision on matter of (316) law is the subject of review; and it is equally clear that the case before us falls under this class of cases. Walton did not "stand committed for a crime," but was restrained of his liberty as a conscript. His case presents a question of law, arising under an alleged contract, and the right is adjudicated and determined by the decision of a single judge.

2. Admitting that the Court of King's Bench and the Supreme Court in several of the States where their statutes provide for it have power to review the action of a single judge in *habeas corpus* cases, when one is restrained of his liberty for some cause other than the commission of a criminal offense, it was insisted that this Court has no such power, because its jurisdiction is limited, and it has no jurisdiction except what is conferred by statute. *Binford v. Alston,* 15 N. C., 399; *American Bible Society v. Hollister,* 54 N. C., 10, and *Smith v. Cheek,* 50 N. C., 213, were relied on.

When these cases were decided there was, as is said in *Bryan's case, ante.* 1, a general impression against the power of the Court, and candor requires the admission that the judges were then of opinion that the Court did not have jurisdiction in *habeas corpus* cases; and although those cases are correctly decided, yet the language used must be restricted, and the general import controlled, by construing it as having reference only to the questions then before the Court. Within the last few years the subject of *habeas corpus* has called into action the utmost effort of the legal mind, both of the bar and the bench, and eliminated the fact that the *protection of personal liberty is a distinct head of jurisdiction.* In the *Matter of Bryan,* after full argument and due consideration, this Court held that, in regard to the proceeding under writs of *habeas corpus,* the Court has a common-law jurisdiction: "So that the establishment of a Supreme Court, without any words to (317) that effect, necessarily, and as an incident to its existence, by force of the bill of rights, of the Constitution, and the principles of the common law, invests it with power to inquire, by means of this great writ of right, into the lawfulness of any restraint upon the liberty of a freeman," and the inference is made that although in actions at law, indictments, and suits in equity it was deemed expedient to limit the jurisdiction, as to the manner of constituting such cases in that Court, so as to make the jurisdiction *appellate* only, yet in regard to the important subject of jurisdiction, to wit, the writ of *habeas corpus,* there is no limitation of power or restriction, save the principles and usages of law, "it

being the opinion of the Legislature that the power would attach to the Court as soon as it was established, as an incident of its existence, upon the principles of the common law and bill of rights."

We are fully satisfied of the soundness of this conclusion, and it has since received the sanction of a *legislative enactment.* So the question must be considered as settled. We allude to the act of June, 1863, by which it is enacted that a single judge may, in term-time, grant a writ of *habeas corpus,* and make it returnable either before himself or some other judge, or before the *Supreme Court;* thus expressly recognizing the jurisdiction of the Court.

Taking this to be so, it follows as a necessary consequence that the Court has the power to review the action of the Superior Courts and of the judges in vacation, upon questions of law, in all cases of *habeas corpus,* when a decision is made and the rights of the parties are determined; that is, in all cases under section 10 of the *Habeas Corpus Act.* For it is the function of every court which is "supreme," not simply a "court of appeals" or a "court of conference," to control the action of all other judicial tribunals, so as to prevent them, by prohibition, from exceeding their jurisdiction, and to correct errors while acting within
(318) their jurisdiction. When the mode of exercising this jurisdiction is provided by statute, as in respect to actions at law, indictments, and suits in equity, that, of course, must be pursued; when no mode is provided, the Court must pursue a mode which is "agreeable to the principles and usages of law." It may be that in a *habeas corpus* case of the kind now under consideration, constituted in the Superior Court, an appeal will lie under the general provisions of the Rev. Code, ch. 4, secs. 21, 22. When the decision affects the rights of infants, the Legislature has deemed it expedient to allow the matter to be brought up both from a court and a single judge, by the speedy mode of appeal, Acts of 1858, ch. 53. In all other cases it is left to be done in such way as is "agreeable to the principles and usages of law."

It is gratifying to know that the Court possesses this jurisdiction, for it would have been a deplorable state of things if Williams is to serve as a conscript because his case was decided by Judge A., and Walton is not to serve because his case was decided by Judge B., and that there should be no mode of correcting the error, so as to settle the law—make it uniform, and give to *decisions* in such cases the weight to which an adjudication of the highest judicial tribunal of the State is entitled.

BATTLE, J., concurred.

MANLY, J., dissenting: The question presented for our consideration is, whether the Supreme Court has the power to bring into the Court

for revision a case of *habeas corpus* tried and disposed of by a judicial officer at chambers. I am of opinion the Court has no such power, either by statute or at common law.

At the last term of the Court, in the *Matter of Bryan, ante,* 34, the Court held that it had original jurisdiction to issue the writ and to hear and decide causes. I was too unwell at the time to take part in the decision of that case, and gave no opinion in it. Subsequently, I gave it all proper consideration, and have been unable to concur (319) with my associates. The jurisdiction, then assumed for the first time since the establishment of the Court, is of the gravest importance, and I deem it proper to put upon record, briefly, the reasons which influence me to dissent. These reasons will be found also to have an important bearing upon the case now before us. The question then made was, whether the Court had the power to grant the writ of *habeas corpus* as an original writ to acquire jurisdiction.

Supposing the Court to have no common-law jurisdiction, and to be confined within the limits prescribed by statute, the question must be decided by the construction which shall be put upon the act of 1818, Rev. Code, ch. 33, sec. 6. That part of the act bearing upon our inquiry is as follows:

"The Court shall have power to hear and determine all questions of law brought before it by appeal, or otherwise, from a Superior Court of law, and to hear and determine all cases in equity brought before it by appeal or removal from a court of equity; and in every case the Court may render such judgment, sentence, and decree as on inspection of the whole record it shall appear to them ought, in law, to be rendered thereon; and shall have original and exclusive jurisdiction in repealing letters patent, and shall also have power to issue writs of *certiorari, scire facias, habeas corpus, mandamus,* and all other writs *which may be proper and necessary* for the exercise of its jurisdiction, and agreeable to the principles and usages of law; and it may, at its discretion, make the writs of execution which it may issue returnable either to the said Court or to the Superior Court from which the cause may have been removed."

The whole of the passage quoted describes, as I think, a purpose on the part of the Legislature to make this Court a court of appeals, authorizing it to hear only cases brought into it by appeal or removal from the courts below. The first part of the passage quoted is (320) appropriate to this purpose. The act then gives the Court an *original* and *exclusive* jurisdiction (using the words) in repealing letters patent; and it then proceeds to give the use of certain writs which it was easy to foresee might be needed for the full and effectual exercise of the jurisdiction granted, to wit, writs of *certiorari, scire facias, habeas*

corpus, mandamus, and all other necessary writs. That the writs here specially enumerated are all in the category of ancillary writs is inferable from the fact that some of them are plainly and necessarily so, because rarely, if ever, used in any other way, and from the use of the word "other." In the connection in which it stands, it must imply that *some,* at least, of the antecedently enumerated writs were auxiliary in their nature, and provided as such. If it had been intended to make the grant of auxiliary writs only, in the latter part of the clause in question, and to give power to the Court in respect to the previously enumerated writs, to use them for acquiring jurisdiction, either the order of the words would have been inverted, and the grant of auxiliaries would have followed immediately the grant of principal powers, or the word "other" would have been dropped, and it would have read, after the enumerated writs, *and all writs which may be proper and necessary.*

The words "all other" seem naturally to mean an indefinite extension of a class of writs then partly enumerated. If the relative "which" be extended at all beyond the words, *all other writs,* for an antecedent, it must be clearly referred to all the *enumerated writs.*

I have dwelt more at length upon the phraseology of the Court act because I suppose its construction controls substantially the question which was then before the Court. If the power then exercised be not there granted in terms, or by plain and necessary implication, it (321) is not granted at all; for the Court has no common-law jurisdiction. It is the creature of the statute law, and has its power limited and defined by that law. It possesses no greater capacity to take jurisdiction or to exercise power than the law gives. Other courts of the State have what is called a common-law jurisdiction, that is to say, such powers as they have been accustomed to exercise under the approval of our ancestors from time immemorial, and unless these powers are restrained by legislation, they may continue to exercise them indefinitely. It is not so in respect to this Court. It is created by statute and clothed with powers there specially defined. With a range of jurisdiction in the very highest regions of power exercised by human tribunals, it is nevertheless a limited range, defined by the written law.

A question of jurisdiction, therefore, in this and other courts of the State would be decided by a different course of inquiry; for, supposing the power in question to be one which had been exercised by the courts of inferior jurisdiction from time immemorial, the inquiry in this Court would still be, Has it been granted to us? while in the courts below it would be, Have they been restrained from its exercise?

The identity of the language used in the two statutes, the one constituting the Supreme Court of the United States, the other the Supreme Court of this State, makes any discussion and exposition of the one per-

tinent in respect to questions arising on the other. The United States Supreme Court act has this provision: "that all the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

The power of the court to issue the writ of *habeas corpus cum causa* came under discussion in *Bollman v. Swartwout,* 4 Cranche, 75. These men were in prison by order of the Circuit Court for the District of Columbia, upon a charge of treason, and the Supreme Court (322) of the United States "in banc" ordered the writ, sustaining the motion for it upon the ground that it was auxiliary and incidental to the Court's jurisdiction. I have considered attentively this case, and it seems to me that the point decided, as well as the course of reasoning of the eminent judge who delivered the opinion, corroborates the view I have taken. In that case the Court was restrained from claiming the power as an independent power by the article in the Constitution defining its jurisdiction. We are precisely under a similar restraint through the law defining our jurisdiction. All law is obligatory alike. We are as much bound by the act of the Legislature establishing the Court and prescribing its jurisdiction as the Supreme Court of the United States is bound by the limitations of its jurisdiction found in the Constitution.

If, therefore, the writ is not sought for in aid of a full exercise of the Court's jurisdiction, it cannot be granted.

The *dicta* in *Bollman v. Swartwout* can be brought to bear favorably on the exercise of the power in question only upon the assumption that this Court has a jurisdiction as of common right. If it have not, but be restrained by the terms of the act, it is an authority the other way. This will be more intelligible by reference to the Constitution of the United States, where it will be found that the constitutional restraint spoken of is the article defining the jurisdiction of the Court.

That this Court possesses no common-law jurisdiction is further made manifest by a practical construction of the organic law from the beginning, ignoring any such jurisdiction, and by a current of authorities, coming down from the period of the establishment of the Court. Whenever the subject has been discussed, the language of the Court appears to have been uniform that its jurisdiction is defined and limited by statutory enactments, and it is, in no respect, derived from the common law. *Binford v. Alston,* 15 N. C., 351; *American Bible* (323) *Society v. Hollister,* 54 N. C., 10, and *Smith v. Cheek,* 50 N. C., 213, show this conclusively. It may be remembered that the judge

(*Gaston*) who delivered the opinion in *Binford v. Alston,* and who speaks most explicitly of the source of jurisdiction, was the framer of our Court Act of 1818; and his opinion, therefore, apart from his acknowledged legal learning, should be considered of special authority.

The question made at the last term in the case of *Bryan* may now be considered at rest, not only by the authority of that case, but also by the action of the Legislature. It is now provided that the judges of this Court may issue writs of *habeas corpus,* and make them returnable to the Court. This, by implication, confers the power to hear and determine them; but it goes no further, and has no effect upon the question now before us, viz., whether the Court has *quasi appellate* or *revisory* power in respect to the decisions of other tribunals. It seems to me to hold this would be a further disturbance of settled law. The Court has now been established for upwards of forty years, and no necessity for the exercise of such a jurisdiction has been developed, unless the present condition of the country discloses one. Whether it does may be a proper subject for legislative inquiry, and, if need be, for legislative remedy.

To this time the whole course of legislation in the State has carefully avoided lodging an appellate or revisory power anywhere, in matters of *habeas corpus.* It seems to have been designed by the Assembly to give a summary and determinate remedy to the citizen for an imprisonment considered unlawful by any one of the judges, or by any of the courts in which they sit, and to leave parties to assert rights disputed between them to the ordinary channels of litigation. It was never con-
(324) templated that constitutional questions, and others affecting the public weal and private interests, should be thus determined. The ordinary actions at law, provided to meet every possible requirement, have been considered the safer means of adjusting controversies, and have been studiously preferred, as I infer from a review of our legislation. Sound reasons may be given why the Legislature should prefer that the writ might be thus facile and speedy in its action, rather than of the highest authority in its results. At any rate, such has been the policy, as I conceive, and the judicature of the country has no power to reverse it.

The act of the last Legislature, I have said, does not affect the question. There is no necessary connection perceived between the *original* jurisdiction conferred by the act and the *revisory* jurisdiction which it claims to draw after it. The one is supplying what appears to be a *casus omissus* in the *habeas corpus* act, and is in accordance with the policy of the State legislation; the other reverses that policy. The sole effect of the act is to add another to the one subject of original jurisdiction possessed by this Court.

Upon the whole, my opinion is that this Court has no right, at common law or by statute, to take jurisdiction of and revise a case of *habeas corpus* tried before a judge at chambers, either by writ of error, *recordari*, or other process.

It is conceded that a right to revise a case of *habeas corpus* may be as easily deduced from common-law principles as a right to entertain *original* jurisdiction. As the one, however, does not necessarily follow the other, I have thought it due to the importance of the decision to file a separate opinion, expressive of my views, and showing why it is that I cannot concur.

By the Court: Motion allowed. (325)

NOTE.—Appeal in certain *habeas corpus* cases will lie. *Matter of Ambrose*, 61 N. C., 91; *In re Holley*, 154 N. C., 166; *In re Wiggins*, 165 N. C., 458; *Page v. Page*, 166 N. C., 90. See *S. v. Adair*, 68 N. C., 68; *Thompson v. Thompson*, 72 N. C., 32; *Harris, ex parte*, 73 N. C., 66.

Cited: *S. c., post*, 326; *Wood v. Bradshaw, post*, 424; *Bridgman v. Mallett, post*, 507; *S. v. Herndon*, 107 N. C., 935; *In re Briggs*, 135 N. C., 130; *Johnson v. Cameron*, 136 N. C., 247.

T. H. GATLIN v. EDWARD S. WALTON.

(1 Winst., 333.)

1. The acts of Congress of 5 January and 17 February, 1864, concerning conscription, are constitutional and valid.
2. If a contract were made between the Government and the conscript, by which the latter furnishes a substitute, under section 9 of the act of 16 April, 1862, the Government has a right to annul the contract by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power.
3. But it *seems* no contract was made by the Government with the conscript furnishing a substitute.

PEARSON, C. J., dissenting.

A WRIT of *certiorari* was sued out by Captain T. H. Gatlin (see the case of *Walton v. Gatlin, ante*, 310, on the motion for a *certiorari*), returnable immediately. The writ is set out at length, because the form was settled by the Court.

The State of North Carolina, to the Hon. Richmond M. Pearson, Chief Justice of our Supreme Court, Greeting:

Whereas, in the proceedings on a writ of *habeas corpus* sued out by E. Stanly Walton against T. H. Gatlin and returned before you, and

in the judgment thereon, rendered by you, there is manifest error, to the injury of the said T. H. Gatlin, captain in the Army of the Confederate States of America, as he has complained to us: These
(326) are, therefore, to command you that you send immediately into our Supreme Court, now sitting at Raleigh, the record of the said writ, proceedings, and judgment, certified under your hand and seal.

Witness, Edmund B. Freeman, clerk of our said Court, at office, the second Monday in June, 1864.

Indorsed upon the writ is:

The answer of Richmond M. Pearson, Chief Justice of the Supreme Court of North Carolina, within named:

I certify to the Supreme Court of North Carolina the writ of *habeas corpus* within specified, together with the return thereto, and the proceedings had therein before me, and the opinion given by me, and judgment rendered in pursuance thereto, as I am within commanded.

Witness my hand and seal, this 25 June, 1864.

R. M. PEARSON, C. J., S. C. [SEAL]

The writ of *habeas corpus,* the return thereto, and the proceedings and judgment thereon, are described in the report of the motion for a *certiorari. Walton v. Gatlin, ante,* 310.

Bragg and Winston, Sr., for Gatlin.
Moore and Fowle for Walton.
Strong, C. S. District Attorney, for the C. S. Government.

BATTLE, J. The writ of *certiorari* in this case brings before the Court for review the judgment of his Honor, the Chief Justice, pronounced in vacation, in a proceeding on a writ of *habeas corpus.* The facts upon which the judgment was rendered are set forth in the petition of the applicant for the writ and the return of the officer, and they present the question whether the act of the Confederate Congress, approved 5 January, 1864, and entitled "An act to put an end to the exemption from military service of those who have heretofore furnished substitutes," is constitutional. The act is in these words:
(327) "Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms:

The Congress of the Confederate States of America do enact, That no person shall be exempted from military service by reason of his having furnished a substitute; but this act shall not be so construed as to affect persons who, though not liable to render military service, nevertheless furnished substitutes."

The Chief Justice, in the opinion which he has filed as explanatory of the reason upon which his judgment was founded, has declared that the petitioner, having under the provisions of the act of 16 April, 1862, furnished a substitute and obtained his discharge from military service, made a binding contract with the Government, which Congress had no constitutional power to violate. The question thus presented upon the constitutionality of the act of January, 1864, is invested with momentous importance, and has been argued before us with very great zeal and ability by the counsel on both sides. I have given to the arguments all the consideration in my power, and will proceed to state the conclusion at which I have arrived and the reasons which have conducted me to it.

The governments which the emigrants from Great Britain established on this continent in the sixteenth and seventeenth centuries were largely imbued with the principles of the country from which they sprang. And even when, in the eighteenth century, they severed the bonds which had connected them with the mother country, and became free and independent States, the new governments which they formed, though differing widely from the old, still retained, particularly in their legislative bodies, many of the attributes and much of the spirit of the nation from which they emanated. The source from which legislative power was supposed to be derived in the nationalities of the Western conti- (328) nent was very different from what it was in the Eastern; but the extent of power, except in the cases of a restriction by a written constitution, varied very little in the legislatures of the free States of America from that of the Parliament of Great Britain. It may aid us, then, in our investigations, to inquire what were the powers of the British Parliament, and what those of the several American States prior to the formation of the Government of the United States, and subsequently of that of the Confederate States.

The power and jurisdiction of Parliament (says Mr. Justice Blackstone, quoting from Sir Edward Coke) are so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. . . . It can, in short, do everything that is not naturally impossible, and, therefore, some have not scrupled to call its power, by a figure rather too bold, the "omnipotence of Parliament." In the exercise of these vast powers, we know that the Parliament claimed and acted upon the privilege of violating contracts, and of taking away vested rights, when it was deemed that the good of the country required it. An interesting instance of the latter kind is seen in the statute of 9 and 10 Vic., ch. 54,

which opened the Court of Common Pleas to the practice of the bar generally. Prior to the year 1834 the sergeants at law had had from time immemorial the exclusive privilege of practicing, pleading, and audience in that court, but in that year his Majesty, King William IV., issued a warrant under his sign manual to the judges of the court, commanding them to open it to all the other members of the Bar. The judges did so, and the sergeants, after acquiescing in the change (329) for a few years, brought the matter to the attention of the court, and questioned the authority of the Crown to take from them a valuable exclusive privilege which, from the very origin of the court, had been vested in them. After a solemn argument, the court decided against the power of the Crown to do what the warrant had commanded, but admitted that it might be done by Parliament (see 37 Eng. C. L., 338 and 362); and it being a reform which the best interests of the country demanded, it was accomplished by the statute to which we have referred. It is but justice to the legislators of Great Britain to say that, though they possess this transcendent power, and have sometimes abused it, they have, in the main, been very solicitous to secure intact private rights and to preserve inviolate the public faith.

We come now to the legislatures of the American States, after they had gained their independence. When established by the people of their respective States, these bodies were invested at once with supreme legislative power, except in the particulars in which the people themselves, assembled in convention, had restricted them by written constitutions. See *Hoke v. Henderson,* 15 N. C., 1. Among the powers which they claimed and exercised was that of resuming granted lands, and of otherwise interfering with the obligations of executed and executory contracts. This is proved both by the political and judicial records of the country. *Owings v. Speed,* 5 Wheat., 420 (4 Curtis, 688), is a striking case directly in point. The facts are not stated by the reporter, but from the opinion of the Supreme Court, as delivered by *Chief Justice Marshall,* the case will be seen as follows: The suit was brought in the Circuit Court of the United States for the district of Kentucky, to recover a lot of land lying in Bardstown. The plaintiff claimed under a patent issued by the Commonwealth of Virginia in 1780. A (330) part of the same land was afterwards, in 1788, granted by the Legislature of Virginia to other persons, and the defendant claimed under them. A verdict and judgment were rendered for the latter, upon the ground that, when the act in question was passed, the Constitution of the United States had not been adopted; therefore, the prohibition upon the State to pass laws violative of contracts, contained in that Constitution, did not apply. Here there was a case where a parcel of land, vested in one person by a patent, which was an executed

contract, was taken from him and granted to another by the Legislature of the same State that had issued the patent; and yet it was sustained by the highest Court in the United States, affirming a judgment, not of one of the State courts, but of a Circuit Court of the United States. That was one mode in which the obligation of a contract was violated. Another very common one was seen in the passage of laws by which "worthless lands and other property of no value to the creditor were made a tender in payment of debts; and the time of payment stipulated in the contract was extended." See *Sturges v. Crowninshield,* 4 Wheat., 122 (4 Curtis, 362). These instances show conclusively that the legislatures of the different States, prior to the adoption of the Federal Constitution, claimed the power to violate contracts whenever, in their estimation, the good of the State required, and the courts felt constrained to sanction their acts by adjudications in favor of them.

Let us now see what powers were vested in the Congress of the United States. The Federal Government was established by the people of the several States, "in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." To accomplish these all-important objects, each State surrendered a portion of its sovereignty, and vested it in the new Government. The attributes of sovereignty thus given up were (331) those which concerned the foreign relations of the Government. Thus we find among the enumerated powers of the Federal Constitution, the great ones, to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. These powers were essentially and absolutely necessary to enable the United States to take and maintain its stand among the nations of the world. By looking at the Constitution, it will be seen that the powers are given with very few express restrictions, and with none implied, except what are necessary to the continued existence of the State governments. Where it is said that the Federal Government is one of limited powers, it is not to be understood as true in the sense that all its powers, as, for instance, the great powers of war and peace, of taxation, and the regulation of commerce, are limited, but that the number of powers granted is limited. The proper expression, then, is that it is a government of *enumerated* powers, rather than one of *limited* powers. The truth of this, as to the power of regulating commerce, is admirably demonstrated in the able and interesting exposition of the nature and extent thereof contained in the opinions of the judges in the great case of *Gibbons v. Ogden,* 9 Wheat., 1 (6 Curtis, 1), and as to the power of taxation, in the opinion of *Chief Justice Marshall* in the leading case of *McCulloch v. Maryland,* 4 Wheat., 316 (4 Curtis,

415). But it is the war power of the Federal Government which my argument requires me more particularly to consider. It is contained in the Constitution of the United States, Art. I, sec. 10, pars. 10, 11, 12, 13, 14, 15, and 17. This power is given in the most unlimited terms, the only restriction upon it being that, in raising and supporting armies, "no appropriation of money to that use shall be for a longer term than two years." (See paragraph 11 of the article and section referred to (332) above.) The first duty of a nation is that of self-preservation, and to that end "it has a right to everything necessary for its preservation." Vattel's Law of Nations, book 1, ch. 2, secs. 16 and 18. The framers of the Federal Constitution, being men no less distinguished for a profound knowledge of the principles of government than for patriotism, knew this, and acted accordingly. They were master workmen, and in the edifice of government which they erected they took special care that those for whose use it was intended should have ample means to protect it. Hence, we find in No. 23 of *The Federalist* Mr. Hamilton declaring that "the authorities essential to the care of the common defense are these: to raise armies, to build and equip fleets, to prescribe rules for the government of both, to direct their operations, to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. . . . This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it, and may be obscured, but cannot be made plainer, by argument or reasoning. It rests upon axioms as simple as they are universal—the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of any *end* is expected ought to possess the *means* by which it is to be attained." To the same effect speaks Mr. Madison in the 41st number of the same work: "Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, (333) to enter into a proof of the affirmative. . . . Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense. But was it necessary to give an *indefinite power* of raising *troops,* as well as providing fleets, and of maintaining both in *peace* as well as in *war?* The answer to these questions has been too far anticipated in another place to admit an extensive discussion of them in this place. The answer, indeed, seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety

could the force necessary for the defense be limited by those who cannot limit the force of offense? If a Federal Constitution could restrain the ambition or set bounds to the exertions of all other nations, then, indeed, might it prudently restrain the discretion of its own government, and set bounds to the exertions for its own safety."

The views of these eminent statesmen and patriots as to the unlimited extent of the war power conferred by the Federal Constitution upon the Government of the United States have never been called in question. An inspection of the Constitution of the Confederate States will show that the same unlimited war power has been conferred, and in almost the same terms, upon the Confederate Government. Thus, in Art. I, sec. 8, it is declared that "the Congress shall have power (par. 11) to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; (par. 12) to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; (par. 13) to provide and maintain a navy; (par. 14) to make rules for the government and regulation of the land and naval forces; (par. 15) to provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections and repel invasions; (par. 15) to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States, reserving to the (334) States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress; (par. 18) and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Confederate States, or in any department or officer thereof."

A government thus invested with the unlimited sovereign power of declaring war and raising and supporting armies, and possessing also the scarcely less restricted sovereign powers of taxation, of borrowing money, and of regulating commerce (see Constitution of the Confederate States, Art. I, sec. 8, pars. 1, 2, and 3), must have attached to it the right of *eminent domain;* for this right is an essential and inalienable attribute of sovereignty. It is so essential and so inalienable that the several States retained it as connected with their respective remaining sovereignties, notwithstanding the great powers which they surrendered to the general government, and notwithstanding they had also surrendered the power of passing any "law impairing the obligation of contracts." See *R. R. v. Davis,* 19 N. C., 451; *S. v. Glen,* 52 N. C., 321. "This right of eminent domain is the right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State. It is evident that this

right is, in certain cases, necessary to him who governs, and consequently is a part of the empire or sovereign power, and ought to be placed in the number of the prerogatives of majesty. When, therefore, the people confer the empire on any one, they at the same time invest him with the eminent domain, unless it be expressly reserved." See Vattell's Law of Nations, book 1, ch. 20, sec. 244. The Confederate Government
(335) must also possess, as an inseparable incident of its sovereign power to declare war and to raise armies, the right to command the services of all its citizens capable of bearing arms. "Every citizen (says Vattell, book 3, ch. 2, sec. 8) is bound to *serve* and *defend* the State as far as *he is capable*. Society cannot otherwise be maintained; and this concurrence for the common defense is one of the principal objects of every political association. Every man, capable of carrying arms, should take them up at the first order of him who has the power of making war." Other writers on government, of great eminence, have laid down the same doctrine. See the authorities referred to in the case of *Ex parte Tate,* decided by the Supreme Court of Alabama at its last January term.

As the Confederate Government possessed the undoubted right of *eminent domain,* those who framed its Constitution deemed it proper not to restrict the exercise of it, for that would have been highly impolitic, but to regulate it by declaring that private property shall not be taken for public use without just compensation. (See Constitution, Art. I, sec. 9, par. 16.) But there is no restriction nor regulation whatever in the Constitution on the power of the Government to command the services of all its arms-bearing population, unless it be deemed such that, for the raising and supporting of armies, there shall be no appropriation of money for a longer term than two years. (See Mr. Madison's article on this subject in No. 41 of *The Federalist.*)

If I have succeeded in showing, as I think I have, that the Confederate Government possesses the right of *eminent domain,* and has also the power of commanding the services in its army of all its citizens capable of bearing arms, I am prepared to prove that Congress had the constitutional power, by the act of 5 January, 1864, to call into the military service of the country the petitioner, Walton, notwithstanding he had previously furnished a substitute.

(336) The only obstacle in the way of my argument is the assumption, made by those who oppose it, that Walton, by procuring and putting into the army a substitute, as he was authorized to do by the act of 16 April, 1862, made a contract with the Government which the legislative department of that Government has no power to violate. Admitting, under a protestation, that a contract was made between Walton

and the Government, and further, that the effect of the act of 16 April, 1862, was not merely to grant an exemption as a matter of grace and favor, yet I insist that the Government had the power, whenever the necessities of the country should require, to annul and disregard it.

Let us see what is the nature of the right or interest which Walton acquired by virtue of his supposed contract. Was it property, or something in the nature of property, or a mere personal privilege? If it were none of these, I am at a loss to imagine what it was. The counsel for the petitioner say that it was property, a thing of value. Suppose it was: then the Government had an undoubted right to take it, upon making just compensation to the owner, as has already been clearly demonstrated. But it cannot be regarded as property in the sense in which that term is used in the Constitution. It cannot be "taken" from the owner. It cannot be liable to the payment of his debts; and yet it is a well established principle of law that a man cannot own property, in the proper sense of that term, of any kind, real or personal, in possession, in expectancy, or in action, legal or equitable, which cannot, in some way, or in some court, be made available by his creditors for the satisfaction of their demands. *Graves v. Dolphin*, 1 Sim., 66; *Piercy v. Roberts*, 1 Mylne and Keene, 4; *Snowden v. Doles*, 7 Sim., 524; *Mebane v. Mebane*, 39 N. C., 131; *Hough v. Cress*, 57 N. C., 295. It seems to me to be certain, then, that Walton's exemption from military service was not "property," which could be taken from him for (337) public use, and, not being such, there was no obligation on the Government to make compensation. As Walton's exemption from military service was not property in the sense of the Constitution, it must be regarded as a mere personal privilege, and as such it may be a thing of value. Still it was liable to the control of the Government by virtue of its right of *eminent domain*, or its power to command the services of all the arms-bearing population of the country. It cannot possibly escape the operation of one or the other of these two great prerogatives of government. Had it fallen under the first, then a just compensation would have been due to the owner; but being under the second, the Constitution makes no such provision in his favor. It resembles, in the respect of being personal and inalienable, the right which a person may have in an office, and it is clearly established that when the necessities or the good of the country require it, the office may be abolished, though the effect of it will be that the officer will be deprived of the emoluments without any claim to compensation on that account. *Hoke v. Henderson*, 15 N. C., 1; *Butler v. Pennsylvania*, 10 How., 416 (18 Curtis, 435). The necessities of a nation, as of an individual, have laws of their own, and that is the true meaning of the celebrated maxim, that "necessity has no law." It has a law, but it is the law of exception. "Thou shalt not

kill" is an injunction of the law, divine and human. "Thou mayest kill in necessary defense of thine own life" is a precept of the same law, of no less force than the other.

I have considered this case without adverting to the fact that Walton does not allege in his petition that he paid any money or other valuable consideration to his substitute to induce him to become such. If he were entitled to any compensation, then it would be difficult to ascertain the *quantum*. But the view which I have taken of the case renders
(338) it unnecessary for me to say any more on the subject. I have alluded to it only for the purpose of showing that I had not overlooked the allegations of the petition.

Having, as I hope, vindicated successfully the *power* of Congress to revoke whatever right or privilege Walton had acquired by his supposed contract with the Government, made under the sanction of 16 April, 1862, I will endeavor to show what was the true nature of the contract, if contract it were. Parties who enter into a contract necessarily do so with reference to the existing law. If they use terms apparently absolute, but to which the law annexes a condition, such condition will, of course, be implied. The distinction mentioned in the books between express and implicit conditions and express and implied contracts is founded upon this principle. So if one of the parties to the contract possesses the power (which under certain circumstances it will be its duty to exercise) to annul, the other party must necessarily be supposed to enter into the contract with the understanding that it may, under such circumstances, be annulled. The party having the power to annul must be taken to have reserved it, whether it be expressed in the terms of the contract or not, and the other party must be taken to have tacitly acquiesced in such reservation. Government is the only party which can have the right to annul a contract to which it is a party; and when the exigency arises which requires the avoidance—when it may be that the very salvation of the Nation depends upon such avoidance—the Government would be faithless to the great trust confided to it if it did not proceed fearlessly to the fulfillment of its duty. He who contracts with the Government, then, cannot complain that the Government avails itself of its power to put an end to the contract, in virtue of the condition impliedly annexed to it.

(339) These considerations have led me to the conclusion that Congress had the constitutional power to pass the act of 5 January, 1864, and that in doing so it did not violate its faith with the principals or substitutes by calling them again into the military service of the country. In coming to this conclusion, I have not availed myself of the authority of adjudication made by the highest tribunals in several

of our sister States; yet I think I might rightfully have done so. The law of Congress was intended to operate in each and all the Confederate States. It would be unequal and therefore unjust that it should take effect in some of the States and not in others. The State courts have, upon writs of *habeas corpus,* taken concurrent jurisdiction with those of the Confederate States, to decide upon the constitutionality of the acts of Congress, called the conscription acts, and with respect to them there ought to be as much uniformity of decision as is practicable. Impressed with this consideration, and knowing that the constitutionality of the act of 5 January, 1864, had been heretofore sustained by the Supreme Court of Appeals of Virginia, in *Burroughs v. Peyton,* 16 Grattan, 470; by the Supreme Court of Georgia, in *Doby v. Harris, Fitzgerald v. Harris, Howell v. Cohen,* Supplement to 33 Ga., 38; and by the Supreme Court of Alabama, in *Ex parte Tate,* I should have been reluctant to have concurred in making a different decision. The judgment of his Honor, the *Chief Justice,* rendered in vacation, was given before either of the adjudications to which I have referred was made known, and of course he could not have been influenced by that weight of authority which would now, were my convictions different from what they are, press upon me.

As my brother *Manly* concurs in the conclusion at which I have arrived in this case, the judgment given by the *Chief Justice* in vacation must be reversed with costs, and the petitioner, Edward S. Walton, be surrendered to the custody of the defendant, T. H. Gatlin. (340)

MANLY, J. The great importance of the subject, and the disquietude which it has caused in the public mind, induce me to add to the reasons of my brother *Battle* such as occur to me for the judgment we give. I shall do so briefly.

All contracts or engagements on the part of Government with individual citizens must, from the paramount nature of its duties to the public, be subject to conditions. Public necessities may arise which will require a modification or reversal of the policy out of which such contracts spring, and it will become the duty of the sovereign power to provide for such necessities by all means and at every hazard. Wherefore, if it be conceded that substitution, under act of 16 April, 1862, was a contract in the sense contended for, dispensing the conscript from further military service during the war, it was, nevertheless, a contract subject to the condition of which I speak. From the nature of the case, the Government, under its high responsibilities, must judge when this necessity comes; and Congress has accordingly declared in the preamble to act of 5 January, 1864, in obedience to which the petitioner was con-

scribed a second time, that it had come. "Whereas," it says, "under the present circumstances of the country, it requires the aid of all who are able to bear arms."

If any evidence were proper or needful to confirm the truth of the view taken by Congress, a survey of the situation at that time would convince any unprejudiced mind. A large portion of our States was occupied by a foreign foe. The invasion was established by a power stronger in all military appointments than ours, having an overwhelming population more numerous in the proportion of five to one, and large armies were mustered and marched into the country by every open avenue to pillage and waste the land and to subjugate its inhabitants.

Surely the time had come, if such a time can come, when the
(341) Government had a right to call upon every man to aid in its defense.

Authorities are abundant as to the rights and duties of the war power in such an emergency. Vattel, Burlamaqui, Wheaton, and Calhoun have been referred to, and are believed to be full and explicit upon the point that exigencies may and will most probably arise in the history of every community in which its entire resources in men and money may be needed to defend its existence, and that, in such case, it is the right and duty of the war power to call them into action. Every other consideration yields to self-preservation—the supreme law. Vattel, book 3, ch. 2; 2 Burlamaqui Nat. and Pol. Law, 151; Wheat. International Law, p. 85; Calhoun's Discourse on Government, p. 10.

Whatever restraints may be imposed in the Constitution upon the Government of the Confederate States in other respects, it is clear, in respect to the making of war, maintaining armies, and providing for the public defense, that they are unfettered. Of these matters that Government has sole charge, and it constitutes one of those high attributes of power upon the proper exercise of which its very existence depends. It cannot be abdicated, contracted away, or encumbered, but should be kept as a trust to be used for the public safety when there is need for it, unembarrassed by claims of private right. The power of the Government over persons, like that which it possesses over property in the right of eminent domain, is to employ every man, as well as every dollar, if need be, in defense. The Government is but the representative of the people, and it has, therefore, in substance, the right which the people have to call upon one another for aid.

These principles are reasonable, consist with natural law and with the law of the land, and should be present in the minds of all citizens making contracts among themselves or with the Government. They are

binding upon all, and need never, therefore, be carried into ex-
(342) press stipulation, for this could add nothing to their force. Every

contract is made in subordination to them, and must yield to their control as conditions inherent and paramount, whenever a necessity for their execution shall occur.

When Congress, therefore, calls upon a citizen, who under ordinary circumstances would be exempt, for military service in this emergency, to speak of it as a violation of contract seems to me to be a misuse of words. It is a condition of the contract, not arising out of its literal terms, but superinduced by the prëexisting and higher authority of the laws of nature, of nations, and of the community to which the parties belong.

The principle here asserted has been rarely discussed, or supposed to have any bearing upon the practical affairs of mankind, because the occasions have been rare in the history of the world which called for its practical application.

Subject to this intrinsic condition which attaches itself to every contract, I think they are binding alike between individuals and between Government and individuals. Government cannot be constrained by legal process to execute its contracts with individuals, but their fulfillment is nevertheless enjoined by the immutable laws of right and natural justice, which even governments are not at liberty to disobey.

There is no article in the Constitution of the Confederate States which forbids the Congress to pass an act impairing the obligation of contracts, and the courts could not, I take it, declare such an act inoperative. There is nothing in the organic law to prevent them from violating their own contracts but faith and honor, a sense of justice and of their own interests, which they cannot be supposed to want, and which constitute for them their rule of action.

I have considered the case thus far upon the hypothesis that a (343) contract was intended between the Government and the conscript. I will now proceed to inquire whether that hypothesis be true.

It should be remembered that the petitioner was conscribed under the act of April, 1862, put in a substitute, as allowed to do by section 9 of that act, and was discharged. He was again conscribed under the act of January, 1864, sued out the writ of *habeas corpus* now under review, and was discharged by the judicial officer before whom he was taken.

The act under which the second enrollment was made is the well known act of 5 January, 1864, the preamble of which has been already quoted. No point has been made upon the constitutionality of conscription generally, but resistance is made to the act of '64 upon the ground that the furnishing of a substitute under the act of 1862, and his consequent discharge, was a contract of discharge for the war. The clause of the act allowing substitutes is in the following words: "Persons not liable to duty may be received as substitutes for those who are, under

such regulations as the Secretary of War may prescribe" (sec. 9, act of April, 1862). This is the charter of powers under which the enrolling officer acted in receiving substitutes; and the question is, Did it authorize, in any sense, a contract on behalf of the Government?

No regulation of the Secretary of War, or special language in the certificate of discharge, is believed to affect the question. None has been called to our attention. Indeed, with respect to both, I suppose the true inquiry would be, What was authorized by the law? Did it authorize an irrevocable exemption? The entire power of the officer, I take it, would be to declare the conscript exempt under the clause of the act in question, according to its true intent and meaning. To this test the acts of all ministerial officers should be brought. Within the pale of the law they are valid and binding; without, they have no efficacy.

(344) There have been many definitions of a contract. The one which seems to be fullest and most approved, and which has been elsewhere adopted in discussing this subject, is "an agreement upon sufficient consideration to do, or not to do, a particular thing, between parties able to contract, willing to contract, and actually contracting." The distinction noticed by *Judge Campbell* in his opinion in *Bank v. Knoop,* 16 How., 369, should be kept in mind, between statutes which create hopes, expectations, faculties, and conditions, and those which form contracts. Section 9 of the act of 1862 authorized the condition of exemption upon certain terms (the putting in of a substitute), and may have raised expectations that this condition would be allowed to continue through the term of service for which the enrollment was made. But it by no means follows that there was an engagement of the Government to this effect. It may be conceded that it was the wish and purpose of the conscript to make a contract, that it was indeed his understanding and intention; but this is not conclusive; mutuality of intention or assent is of the essence of a contract. Light may be thrown upon the question, whether there was a contracting on the part of the Government, by turning to the condition of affairs at the time this act of 1862 was passed, and by a consideration of the object it was intended to accomplish. The States were at that time pressed by a foe with superior forces and munitions of war, threatening by overwhelming numbers to surround and crush them as it were in the folds of a serpent. To meet this state of things the law was enacted. The Confederate Government must have been greatly in need of soldiers, and had in prospect an absolute want of the whole available physical force at their demand for defense. Is it probable the States would at such time have intended by contract to strip themselves of any part of their powers, and thus diminish their ability to make successful their defense?

Let it be remembered that the Government had the absolute (345) power to control the citizens for military duty, limited only by the exclusion of State officers; that it had actually resorted to the compulsory enrollment of a class of which the petitioner was one. A service was thus demanded of him, which he owed, and from which he had no escape as a matter of right. Why should the Government make any contract with him dispensing him irrevocably from duty, and weakening and fettering its military power? For it is easy to demonstrate that the principles of substitution, viewed as an irrevocable contract, must diminish the force of the Nation—cannot augment it.

When the legislative department seeks to enlist individual citizens in an enterprise promising public good, and enacts a law granting franchises and privileges to those who will associate and contribute the necessary capital, and citizens actually embark in the enterprise, it is properly regarded as a contract executed. In such cases it is manifestly the interest of the legislative body to bind the State to the extent indicated in the act, in order to secure favor from those who owe them nothing of the sort, time, labor, money, and skill. It is not so in the case of the conscript. The Legislature has unlimited authority to use his personal service. It has but to command, and he must obey.

If in a law exacting such service there be embodied a privilege of exemption, which cannot by any possibility promote, and must probably retard the end proposed, the reason for construing statutes into contracts utterly fails. In the one instance the Government descends from its high position and says to the citizen, Here is an object to be accomplished which will benefit the whole people, but which it is proper should be effected by private enterprise; if you will undertake it, I will grant you privileges which render the doing of it more profit- (346) able and easy. In the other, from its eminence of power, it says to them, The country is invaded, the national existence is menaced; you all owe military service; I bid you to the field. The one is the language of contract *"do ut facias,"* the other, that of command, *sic volo, sic jubeo.* No degree of clemency with which the Legislature may choose to temper the exercise of prerogative can transmute either command into contract, or its accompanying privilege into vested right. There might have been a contract between the principal and his substitute, but with that the Government had nothing to do, except to acquiesce in the same and accept the one man instead of the other. The transaction between them may possess the elements of a contract, but not so as between the Government and the principal. Where is the consideration, for instance, upon which it is based? The Government gets nothing; one man is but substituted for another. There is no damage or inconvenience wrought to the principal. Upon his motion he puts in a substitute,

which he prefers to doing personal service. No outlay of money is made at Government request. The conscript is accommodated. The Government gets no advantage, subjects no one to inconvenience. There is, therefore, not a semblance of a consideration moving between the Confederate States and the conscript. Indeed, it requires more ingenuity than I possess to perceive any one of the elements which constitute a contract in these substitute transactions. Other exemptions from military duty are allowed by the same acts of Congress, and conceded to be revocable, which appear to me on principle no less binding than that of substitution; for instance, the exemptions of persons engaged in manufactures and in the mechanic arts. These cases are quite as strong as those of exempts by substitution. In the former case the parties submit to sacrifices, from which the Government as well as citizens derive advantage; but in the latter there is no advantage accruing to the
(347) Government. I confess myself incapable of appreciating the logic which makes one of these exemptions revocable at will, yet throws around the other all the sanctity of inviolable compact.

Indeed, I discern in neither an intention on the part of Congress to bind the public irrevocably; but in both, the announcement of a policy which might last for a longer or shorter period, but determinable at the will of the Legislature.

Looking at section 9 of the act of 1862, it will be found there is no specified term of substitution or exemption, no declaration of legal consequences to ensue, nothing which savors of abdication or suspension of the power confessedly possessed by Congress over the conscript, and which it was the express object of the act to exert. The language of the clause is permissive and not mandatory, as in the other clauses, and the inference is that exemption by grace only was intended, to continue at the will of the Legislature. This will might reasonably be expected to prolong the exemption whilst, and only whilst, in the opinion of the Legislature, it should be compatible with the safety of the country. Parties might fairly hope that, without a change in the necessities of the States, they would not be again called upon to do military duty; but the Congress represents, in this exercise of power, a sovereign, and as such conscripted a portion of its citizens for military duty, upon the then existing considerations of policy, without annexing restraints on its will or abdicating its prerogative; and, consequently, was free to modify, alter, or repeal the requisition at will.

No engagement of an explicit or direct nature, on the part of the Government, is pretended. The engagement contended for is at best deduced from substitution by way of inference. This is against established laws of interpretation. Government is held to part with its powers only by express grant, never by implication. *Charles River Bridge v.*

Warren Bridge, 11 Peters, 548 (12 Curtis, 496); 2 Parsons on (348) Contracts, 506; 3 Parsons on Contracts, 552; *McRee v. R. R.,* 47 N. C., 186.

The direct authority referred to in the argument, *Commonwealth v. Bird,* 12 Mass., 422, was a case of military exemption. In a statute requiring certain extra military duties it was stipulated that those who performed them for the space of five years should be exempt from further military service for life. Bird had confessedly put himself in a condition to claim this exemption, and was in fact exempt for some years; but the exemption was afterwards revoked by statute, and the revocation was held to be legal.

We have been assisted in our consideration of the subject before us by cases of a like nature in the States of Virginia, Georgia, and Alabama, which seem to have been well considered. These cases decide the acts of April and September, 1862, and also the act of January, 1864, to be constitutional and valid.

They are entitled, I think, to much weight, and serve to confirm and strengthen the conclusion to which this Court has come. *Burroughs v. Peyton* and *Abrahams v. Peyton,* 16 Gratt., 470, and matter of *Abrams, Fitzgerald, Daley,* and *Cohen,* in Georgia, Supplement to 33 Ga., 38, and matter of *Tate,* in Alabama, at Summer Sessions, 1864.

Reviewing, then, and condensing what has been said, I am of opinion:

1. That Congress, in the exercise of the war power, cannot grant permanent and irrevocable exemptions upon any terms whatever, and viewing such exemptions in the light of contracts, they must be subject to the condition, that if the public necessity require, they may be revoked, and that each successive Congress must judge of the necessity.

2. That the act of Congress of January, 1864, declared such a necessity then to exist, and therefore the revocation by that act of exemptions by substitution was valid and legal.

3. That section 9 of the act of April, 1862, did not authorize (349) exemptions as matters of contract on the part of the Government, but as matters of grace and favor; and that the policy of that act in this particular was subject to modification or repeal at all times at the will of the legislative body.

4. In conformity with these principles, I am of opinion that the act of Congress of 5 January, 1864, declaring that "no person shall be exempt from military service by reason of his having furnished a substitute," and the act of 17 February, 1864, which repeals all previous exemptions, both have the effect of repealing so much of the act of 16 April, 1862, as allows an exemption to any one furnishing a substitute, and are constitutional and valid. And the petitioner in this case, not-

withstanding he had furnished a substitute, is now liable to military service, agreeably to the provisions of said acts of 5 January and 17 February, 1864.

The decision below, discharging the prisoner, *is reversed,* and he is recommitted to the custody of Captain Gatlin.

PEARSON, C. J., dissenting: After a full argument at the bar, after reading attentively the opinions filed in the courts of Virginia, Georgia, and Alabama, and after a free discussion with my brothers *Battle* and *Manly,* the conviction that there is no error in the judgment rendered by me at Salisbury is unchanged. On the contrary, it is firmer, because I have now heard all that can be said, and am satisfied that the reasoning set out in the opinion filed in support of that judgment has not been, and cannot be, answered. I adopt it as my opinion in this case. (See that opinion in *Ex parte Walton,* hereto annexed.)

In regard to the decisions in the States referred to, being made *post litem motam,* they are not entitled to the weight of authority, and
(350) should only receive the consideration due to the reasoning offered in their support; and I must be allowed to protest against the position that the action of the courts of other States can have any legitimate bearing on the action of this Court. When North Carolina was called on to decide the great question of withdrawing from the Union, the action of the other States was a matter relevant to the question, because it was a *political* one; but ours is a question of law, the principles of which are fixed, and should not be influenced by collateral circumstances.

My brothers *Battle* and *Manly* have put the decision on the only ground which is unanswerable, "necessity knows no law"; for if the courts assume that the Government may act on that principle, there is no longer room for argument. We may put aside the "books" and indulge the hope that when peace again smiles on our country law will resume its sway. *"Inter arma silent leges."*

PER CURIAM. Reversed, and prisoner recommitted to custody of Captain Gatlin.

EX PARTE WALTON.

The opinion of *Pearson, C. J.,* in the case *Ex parte Walton,* referred to in the preceding case, is made a part of the same:

The writ issued 27 January, but the hearing was postponed under an arrangement with Col. Peter Mallett, commandant, etc., in order to have

a full argument. In August, 1862, the petitioner, being conscripted, put in a substitute; the substitution has been adjudged valid. The case, then, depends on the question, Had Congress power to pass the act conscripting men who have put in substitutes? The power of a judicial tribunal to declare an act of Congress unconstitutional, when it is necessary to decide the question in order to dispose of a case properly constituted before it, is settled. Acts of Congress not unfrequently involve questions purely legal, and the wisdom of giving this jurisdiction to the judiciary is manifest; for, besides the advantage of having (351) such questions passed on by those who have not become heated in the arena of politics, there is this further consideration: members of Congress are not elected because of their supposed knowledge of law, and those who have not devoted themselves to the science, however able they may be as statesmen, or eloquent as orators, are not presumed to be as good judges of law as men who have made it "a lifetime study." The courts, however, always presume an act to be constitutional, and do not declare it void except on the clearest conviction. Where, as in this instance, a dry question of the common law is involved, the judge is "more at home," and feels less embarrassment in dealing with the subject than when the question depends solely on the construction of the Constitution, as in questions of constitutional law the province of the judge and that of the statesman frequently run so nearly together as to make it difficult to distinguish the dividing line.

The power of Congress depends on the questions (1) Is substitution a contract? (2) Has Congress power to violate its own contract?

1. Is substitution a contract? This is a dry question of the common law, and should be considered without reference to politics. There are parties capable of contracting; there is a thing to be the subject of contract; so I suppose the only question that can be made is as to the *consideration.* "Gain to one and loss to the other party is a legal consideration." See *Coggs v. Bernard* and the cases cited in 1 Smith's Lead. Cases, 283. If I lend one my horse to ride to Salem, and he takes him and starts, I am not at liberty to follow on and take my horse from him; it is a contract of bailment, although done merely for his accommodation. If you agree to carry a package for me to Salem, and start with it, I can maintain an action for breach of contract should you be guilty of gross negligence, although I was to pay nothing, and it (352) was purely for my accommodation; your undertaking to carry it and my confiding it to you, is a consideration. So, if you fancy my horse, and I tell you I will not sell, but to gratify you I agree to let you have him, if you will let me have as good a horse, and the exchange be made, title passes by "contract executed," just as if you had paid me the price in money. So, if you are bound to work for me three years at

wages, and for your accommodation I agree to discharge you in consideration of $500, and the money is paid, or if I agree to discharge you in consideration of your putting another man to work in your place, and it is done, there is, in either case, a contract executed, and it can make no difference whether you pay me the money with which I may get another man to supply your place, or whether you pay the money to the other man and he takes your place. This is substitution. Really, the fact that it is a contract seems too plain for discussion; it is neither more nor less than an exchange or "swap," as it is commonly called. The Government agrees to discharge a man in consideration of his putting a sound, able-bodied man in his place, and it is done; this is a valid contract.

It is true, substitution is "a privilege," but it is a privilege offered at a stipulated price, which is paid. So it is a prvilege *paid for,* and that makes it a contract, and distinguishes it from an *exemption,* and because of this distinction, it is made a distinct clause in the *conscription act,* and is not put in the exemption act. Suppose Congress was induced to enter into the contract of substitution in reference to conscripts, in order to make conscription more palatable to the people, and as a means of relief in cases of unequal hardship, and, in reference to volunteers, the Secretary of War was induced to allow it in order to relieve some who,

(353) in a moment of enthusiasm, had entered the ranks and afterwards found the service too hard for them; or suppose the inducement was that our citizens might procure able-bodied men from Ireland or Germany, and put them in the ranks as substitutes, while the citizen stayed at home and raised food and clothing; there is no principle of law by which the inducement can change the nature of the transaction or take from it the character of a contract. You are, by the terms of the contract, to furnish a sound, able-bodied man, and you do so; that is the *consideration;* one man is taken for the other, just as in an exchange for horses, one horse is the consideration for the other; and the fact that it is made for the gratification or accommodation of one of the parties does not in any way affect the legal question.

The ground that substitution is a "mere privilege" is that taken in the President's message and in the debates in Congress, and that was the point mainly relied on by Mr. Kittrell and Governor Bragg in their able and learned argument on the part of the Government. For this reason I have given to it the most anxious consideration, and feel fully convinced that, although substitution is a privilege, yet, as by the agreement it was to be paid for, and the stipulated price has been paid and accepted, it is, to all intents and purposes, an executed contract according to the common law.

It is said Congress will not be presumed to have made a contract by which to deprive the Government of the services of those men during the war. Allow such to be the presumption, it is rebutted by direct evidence. Congress has agreed to the contract of substitution in plain and unequivocal words, so as to leave no room for construction or doubt.

Again, it is suggested, "the manufacturer is exempt upon the condition that he will dispose of his fabrics at rates not higher than 75 per cent added to the cost of production; he promises to manufacture and sell at the reduced price. Here is a privilege paid for." *A condition* is *annexed* to a gratuity, gift, or sale, by which it may be defeated; (354) a *consideration forms a part of the contract itself;* this is the distinction. But, it is true, they sometimes run into each other, and the conditions may constitute a consideration when, from the words used, that appears to be the intention. Whether this be the case in regard to that class of exemptions in which a condition to work at certain rates is imposed on mechanics, is a question not presented; for, take it to be so, it will only add to the list of contracts which Congress has entered into; unless an exemption be made on the ground that this is granted merely as *an exemption,* and no plain and unequivocal words of contract are used, as in the case in regard to substitution. It certainly has not the weight of an argument *in absurdum,* and that is the only point of view in which it can have any bearing.

It is also suggested, "a blacksmith, who has enlarged his business in consequence of his exemption, may say he cannot rightfully be disappointed. A similar argument was urged by Mr. Webster, to justify his change of opinion on the subject of the tariff. He said the New England States had engaged in manufacturing on the faith of the action of the Government in passing the tariff, and they, therefore, had a right to have their manufactures protected." The case of the blacksmith, like that of the tariff, presents simply a *political question*—shall the Government disappoint a reasonable expectation based on its prior action?—not a dry question of law. Mr. Webster, in his speech, puts it on the political ground, and nowhere intimates that the prior action of the Government amounted to a valid, legal contract. One may have reason to expect a legacy and complain should he be disappointed, but he has no *legal* claim, because there is no contract.

2. Has Congress power to violate its own contract? The power (355) of Congress is limited by a *written* Constitution. It has no power except what is conferred by that instrument, and it contains no such power, either expressed or implied. Indeed, it is excluded, for the power to make contracts, for instance, "to borrow money on the credit of the Confederate States," if there be also power to violate it, would be nugatory. No government can have power to violate its own contract, except

under the rule, "might makes right." The power to violate its own contract, or, in other words, the right of "repudiation," has never been claimed by the Confederate States, and I had supposed it was conceded by all that it did not have the power. But I am asked, "Cannot the Confederate States, in a case of extreme necessity, violate its own contract—not with reference to morals, but to the supreme power of the Government—and has the Government of the Confederate States less, and if less, how much less, power than other governments, in a case of extreme necessity?"

The other governments referred to have no written Constitution, and may act on the broad and arbitrary rule, "the safety of the State is the supreme law"; but the Confederate States has a *written Constitution,* which all officers *are sworn to support.* This Constitution, and laws made in pursuance thereof, is "the supreme law." The Constitution, being *written,* can neither bend nor stretch, even in a case of extreme necessity. It is not only written and supported by oaths, but so extreme was the caution of its framers as to provide, "All powers not herein delegated to the Confederate States, or prohibited to the States, are reserved to the States respectively." In some few instances large powers are conferred to meet extreme cases—for instance, the power to suspend the writ of *habeas corpus,* "where in cases of rebellion or invasion the *public safety* may require it," thus excluding, even in the case of "extreme necessity," any power other than those "nominated in the bond."

(356) Again, I am asked, "Admit substitution to be a contract, the power of Congress is limited by a written Constitution: where is the power to make a contract of substitution by which the Government gives up its right to the services of able-bodied citizens for the public defense in a case of extreme necessity, conferred by the Constitution, either in express words or by implication? The word *substitution* is not to be found in that instrument."

In reply, I might ask, Is the word *conscription* to be found in the Constitution? This is a Yankee mode of meeting one question by asking another, which the gravity of the subject forbids. I prefer to meet the question squarely, because I appreciate the motive which prompted it, and recognize it as fair reasoning. The power to conscript is supposed to be conferred by "the power to raise armies," in connection with the general authority "to pass all laws which shall be necessary and proper to carry that power into effect"; and in adopting the means to raise an army by conscription, it follows that Congress has power to modify the means in such manner as to make it injure the public as little as possible, and to produce as great collateral benefit as possible; in other words, to modify conscription by allowing substitution, so as to make it answer the purpose of raising an army and at the same time relieve in cases of

unequal hardship, and collaterally benefit the public by providing the means whereby the citizen might be left at home, to raise food and clothing for the soldiers, and "thus *support* the army" at the same time, that the full complement of soldiers may be kept up by substitutes brought from abroad, or found among those who are not liable to military service. Suppose Congress, in its wisdom, had required, as the consideration for substitution, that *two* able-bodied Irishmen or Germans should be put in the place of the citizen, would it have occurred to any one that the power to conscript did not necessarily include the power to allow substitution on such terms? The greater includes the less. And it will be remembered that substitution is not a new thing; (357) it is prominent, and taken to be a matter of course in all prior legislation, both in this country and in England. Where "the militia" is looked on as a mode of defense in cases of invasion or rebellion, and where conscription was made to take the place of the militia organization, as a matter of course it was accompanied by this prominent feature.

Mr. Kittrell, on the argument, treated the subject in a different light. He assumed substitution to be a contract, but insisted Congress had no power to make that particular sort of contract, on the ground that it would be "political suicide," for, said he, "if Congress has power to deprive the country by its contract of the services of 1,000 of its citizens, it may extend it to 100,000, and 500,000, and so we would have no citizen soldiers!" Whether it would amount to "political suicide" to have a condition of things in which 500,000 Irishmen and Germans would be in the army, to fight our enemy, while a corresponding number of citizens were at home raising food and clothing, and paying taxes to support this army, is a question into which a court is not at liberty to enter. I will observe that this mode of reasoning, by supposing extreme cases, is not apt to lead to truth, and is very apt to cover fallacy (as it manifestly does in this instance), for, allow that, in the extreme case put, it would be political suicide, does it prove a *want* of power, or an *abuse* of power? That's the question. If Congress has the power, whether it will so exercise it as to commit suicide, or to stultify itself, is a matter with which the courts have no concern, and a proper respect for a coördinate branch of the Government forbids the judiciary from making an extreme supposition in order to express a conjecture how far a power may be so abused as to avoid it and require the courts to say it shall not be exercised under that head of jurisdiction by which the courts prevent madmen or idiots from injuring themselves or "wasting their substance." (358)

Congress has power to borrow money on the credit of the Confederate States. It has (I believe) borrowed $15,000,000, and

pledged the export duty on cotton. It had power to do so, as a means necessary and proper to enable it to borrow the money. Run out this reasoning by supposing extreme cases. Congress borrows 150 millions more, and pledges the export duty on tobacco; it then borrows 150 billions, and pledges all export and import duties, and all money that may be raised by direct taxation; this might be political suicide or stultification, and after the money is spent, the Government would have "no assets," and no means of raising any; but will any one venture to aver, on this reasoning, that Congress had no power to borrow the 15 millions and pledge the export duty on cotton? The announcement of such a proposition would startle the commercial world.

Take a case near home: Governor Morehead proposed a plan by which to enable the Government to borrow 400 millions, in consideration, among other things, that the bonds should not at any time be liable to taxation, thereby withdrawing that amount of the wealth of our citizens from liability to support the Government in all time to come. Many said it would be unwise in Congress to withdraw that amount from liability to taxation, but no one ever suggested that Congress did not have power to make the contract; and yet brother Kittrell might run out his mode of reasoning so as to show that Congress might in this manner abuse its power and reduce itself to absolute beggary; *ergo,* Congress did not have the power!

It is gratifying, however, to know that I am not under the necessity of relying on my own judgment in deciding this question. The "inviolability" of a contract, whether made by the Confederate States, or
(359) the State, or an individual, is uniformly upheld by the decisions of our Supreme Court, in a tone of firmness that is gratifying to every one. Search from Haywood's reports to Jones', and you will nowhere meet a decision, or a *dictum,* or an intimation, that the State has power to violate its own contract, or to avoid or repudiate it, on the ground that the power has been or might be abused. To mention a few: *S. v. Matthews,* 48 N. C., 351, where the Court say, if the State has made a *contract* allowing the bank to issue "one-dollar notes" in so many words, the State is bound; *McRee v. R. R.,* 47 N. C., 186, where the Court say, "If the charter grants the monopoly, and the railroad bridge or structure comes within the meaning, it is a contract, and the State is bound, unless the effect of the revolution and our bill of rights was to introduce a new order of things, and avoid all such monopolies"; *Attorney-General v. Bank,* 57 N. C., 287, where it is *decided,* "Where a price is stipulated in the grant of the charter, it is the *consideration* for which the sovereign makes the grant and cannot be increased; to levy a tax on the bank is to add to the stipulated price, and therefore an act of the

Legislature imposing such a tax is in violation of the Constitution, and void." Here is a thing withdrawn from the power of taxation by force of contract.

I have heard some express the opinion that it would have been better not to have made a Constitution for the Confederate States until after the war was over! It is sufficient that it was deemed wise to frame a written Constitution, with a grant of such powers to the Confederate States as are supposed to be ample enough to meet the emergency of the invasion and carry us through the war. The Constitution has been adopted and we are sworn to support it.

The only authority relied on to support the position that Congress has power to violate its own contract is the decision of his Honor, *Judge French,* in the *Matter of Williams.*

The question is, Does that decision settle the law, or should it (360) be overruled? I am aware that, in the opinion of the Secretary of War and of his Excellency Governor Vance, the decision of a single judge on *habeas corpus* questions is only binding in the *particular case,* and I infer from the fact that none have filed opinions except *Judge Heath* and *Judge French* in this instance, that other judges take the same view; but in my opinion it is also entitled to the weight of "the authority" of "an adjudicated case," as settling the law until the judgment be reversed or the principle is overruled; for it is the decision of a tribunal of superior general jurisdiction over the subject, without appeal.

The power of a tribunal having equal and concurrent jurisdiction to overrule a decision is conceded. It is a *judicial* function made necessary by the imperfection of human judgment, and must be exercised in order to secure correctness of decision. True, uniformity as well as correctness are to be desired; but the former is secondary, must yield when it appears that a court has fallen into error; and the sooner error is corrected, the better, for it will spread and become the source of other errors. *Williams v. Alexander,* 51 N. C., 137. On consulting his books, a lawyer is sure to find "cases overruled," as instances: *Stowe v. Ward,* 12 N. C., 57, is overruled by *Ward v. Stowe,* 17 N. C., 509; *Wagstaff v. Smith,* 39 N. C., 1, by *Northcot v. Casper,* 41 N. C., 303; *Spruill v. Leary,* 35 N. C., 225, by *Myers v. Craige,* 44 N. C., 169. But the jurisdiction should be exercised sparingly and only when *palpable error* is shown. Several circumstances were relied on by Messrs. Gilmer and Boyden as tending to weaken the authority of the decision in *Williams' case.* It conflicts with two decisions before made by his Honor, *Judge Heath,* in the *Matter of Farmer,* decided June, 1863, and in the *Matter of Ricks,* published August, 1863. The opinion in *Williams' case* does not show error in either of these decisions, and, in fact, (361)

takes no notice of either adjudication. So there is a conflict, and the decision now to be made is to settle the difference between *Judge Heath* and *Judge French,* by overruling one or the other. Greater respect is due to a decision made after full argument than to one made hastily and without argument. At the time the decision was made by his Honor, *Judge French,* this case was pending, and the hearing postponed in order to have a full argument, and if the first decision be *conclusive* of the law, it might tend to produce the indecent spectacle of "a race" as to who should get the first judgment; and it was stated on the argument that in *Williams' case* the writ was issued, returned, and the decision made on Friday, 29 January, and the opinion filed in time to be sent 40 miles and published on Monday, 1 February, showing haste, or else that the question was prejudged.

Putting these considerations out of view, I take on myself the *onus* of showing palpable error. The first thing that strikes any one who reads the opinion attentively is the fact that his Honor does not deny that, according to the principles of common law, *"substitution* is a *contract."* He says not one word about its being a *mere privilege*—which is the ground on which the matter is put in the President's message and the debates in Congress; but yielding that point, and assuming substitution to be a contract, he boldly takes the position—one which no politician, lawyer, or judge had ever before taken—that the Government of the Confederate States has power under the Constitution "to violate its own contract"; in other words, he avows the right of repudiation, and covers his position by setting forth an array of general principles which he supports by a long list of references. I shall only notice two of the cases cited, being decisions of our Supreme Court: *S. v. Matthews,* 48 N. C. 451. The charter of the Bank of Fayetteville does not authorize
(362) it, in so many words, to issue one-dollar notes. Had such been the fact, there would have been no room for construction, and the Court would have decided that the act of the Legislature was void as violating a contract; but such was not the fact. The charter authorizes the bank in general terms "to receive deposits," "discount notes," and "issue notes for circulation," *without saying of what denomination;* and the Court came to the conclusion that by a fair construction the power to issue one-dollar notes did not form a part "of the essence of the contract," but was "a mere incident" intended by the parties to be subject to future legislation, on the ground that the Legislature will not be presumed, from the use of general words, to give up, by *a contract,* its power to regulate the currency; but this presumption may be rebutted by positive, that is, by the use of plain and unequivocal terms of contract, as if the charter had specified "one-dollar notes," thereby making the evidence of a contract as positive as is done by the words used in the

act of Congress in regard to substitution. His Honor, in what purports to be a quotation from the opinion of *Pearson, J.*, does me great injustice. I set out two alternative positions: "Is authority to issue small notes, conferred by the charter, *as a part of the essence of the contract, with the intention to put it beyond the control of all future legislation?* or is it conferred *as a mere incident*, with the *intention that it should be subject to such limitations as the Legislature might at any time thereafter deem inexpedient, etc.?*" He does not set out both of these positions, or either of them, but confounds them together; takes the words "as a part of the essence of contract" from the first, and substitutes them into the second, in place of the words "as a mere incident," which he omits, and this mars the sense and makes nonsense of it, and represents me as saying: the authority to issue small notes is conferred by the charter "as part of the *essence of the contract,* with the intention that it should be *subject to future legislation,*" and that this is so plain (363) that a mere statement is sufficient to dispose of it. I must be allowed to object to this mode of treating the opinion of judges. *McRee v. R. R.*, 47 N. C., 186. The statement made by his Honor keeps in the background the prominent fact on which the case turns, that the structure—a bridge erected by the company—was a mere *continuation of the road* across the river; no toll was ever received on it as a bridge, and it was used in every respect as any other part of the road, and the decision is put on the ground that a structure or bridge of this sort was not in contemplation of the parties, and was not embraced by the contract. As his Honor admits substitution to be a contract, I am unable to see how these cases have any application to his position, that the Government may violate its own contract. I have not examined the many other references; indeed, it is unnecessary, for I concur in the correctness of "the general principles" in support of which they are cited; and the labor and research bestowed on these general principles only tend to prove that no case can be found to support the particular position on which his decision rests.

In support of his position, his Honor takes two grounds:

1. "There is nothing in the Constitution of the Confederate States which prohibits Congress to pass laws violating the obligation of contracts, though such a power is denied to the several States;" therefore, Congress may violate its own contract—a *non sequitur*. The important distinction, that the States have all legislative powers except such as are prohibited, whereas Congress has no power except it be conferred by the Constitution, is entirely overlooked. As the States have all powers except such as are prohibited, a prohibition in regard to the States was necessary. As the Confederate States has no power except it be conferred by the Constitution, a prohibition in regard to the (364)

Confederate States was unnecessary; all occasion for a prohibition is superseded by the article which provides, "The powers not delegated to the Confederate States by the Constitution nor prohibited by it to the States are reserved to the States respectively." So the conclusion drawn from the absence of a prohibition in respect to the Confederate States is illogical and palpably erroneous.

2. "The Congress shall have power to raise and support armies, to make rules for the government of the land and naval forces," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Confederate States, in any department or officer thereof."

The reasoning is this: the act of Congress conscripting men who have put in substitutes is necessary and proper to carry into effect the power to raise armies; therefore, Congress has power to violate its own contract; a *non sequitur*. His Honor fails to take into consideration the fact that the supposed necessity is caused by the act of Congress which allows substitution as to conscripts, and the act of the Secretary of War, 20 October, 1861, which allows substitution as to volunteers. He fails to consider that the clause to make all laws which shall be necessary and proper for carrying into execution the powers conferred by the Constitution has never before been supposed to be a grant of a *general substantive power*, but is confined to *the means* of giving effect to the powers already conferred, and is merely the expression, out of abundant caution, of what would have been implied; and he fails to consider that the word "proper" is added to the word "necessary"; so the measures adopted must be both necessary and proper, and certainly, however great the necessity may be, it never can be *proper* for the Government to violate its
(365) own contract; and he fails to consider the consequence to which his doctrine leads—nothing more or less than this: Congress has power to do whatever it pleases in order to raise and support an army!!! It may repudiate its bonds and notes now outstanding, a renovated currency being necessary to support the army, or it may conscript all *white women* between the ages of 16 and 60 to cook and bake for the soldiers, nurse at the hospitals, or serve in the ranks as soldiers, thus uprooting the foundations of society; or it may conscript the Governor, judges, and legislatures of the several States, put an end to "State Rights," and erect on the ruins a "consolidated military despotism."

So the fact of subjecting principals of substitutes to military service sinks into insignificance when contrasted with the consequences to which the grounds on which the decision is put must lead, and for which the decision, if not overruled, may be cited as authority. I am convinced, then, there is not only palpable error in this second ground, but it is de-

structive of society and subversive of our Constitution. For these reasons, I do not consider the case of *Williams* as an authority, and for the reasons above stated, I have the clearest conviction that Congress has not, under the Constitution, power to pass the act in question, and feel it to be my duty to declare that, in my opinion, it is void and of no effect.

No one can regret the necessity for this conflict of decision more than I do. What is to be its effect is for the consideration of others. It may be to leave the law unsettled, and that a "judgment of discharge" on *habeas corpus* will, as heretofore, be treated as binding only in the particular case. I suggested to Governor Vance, to meet a condition of things like the present, the propriety of calling the attention of the Legislature, at its last session, to the expediency of amending the law so as to allow appeals in *habeas corpus* cases, and make it the duty of the *Chief Justice,* under certain circumstances, to call an extra (366) term of the Supreme Court. No action was taken by the Legislature. So I have no power to call a term of the Court, and the other two judges concur with me in the opinion that as the Supreme Court has jurisdiction, the law does not authorize a convocation of all the judges in vacation. My duty is plain, to decide the cases before me, according to the best of my judgment.

I must be permitted to express my obligation to the learned counsel, Messrs. Bragg and Kittrell, who argued on the side of the Government, and Messrs. Gilmer, Boyden, Scott, and Caldwell, who argued on the side of the petitioner, and Messrs. Moore and Fowle, who filed written arguments, for the assistance they have rendered me. I feel that I have heard all that can be said on both sides of the question; and if I have failed to arrive at a correct conclusion, it is because the power of judgment with which nature has gifted me, aided by a lifetime study of the principles of the law, does not enable me to make legal deductions.

I will add that the pains taken by the officers of the Government to have the question fully argued before a judicial tribunal affords a grateful assurance of a desire to have the rights of a citizen ascertained and protected by an adjudication according to the Constitution and laws.

It is, therefore, considered that E. S. Walton be forthwith discharged.

Cited: Smith v. Prior, post, 418; *McDaniel v. Trull, post,* 400; *In re Long, post,* 536; *S. v. Miller,* 97 N. C., 454.

APPENDIX

OF

CASES DECIDED BY JUDGES IN VACATION

In the Matter of ROSEMAN.

A writ of *habeas corpus* will be granted for the relief of persons unlawfully detained as conscripts, notwithstanding the act of Congress suspending the writ in certain cases.

Pearson, C. J. The petitioner states he had put in a substitute, and being advised he is not liable to conscription, applies for a writ of *habeas corpus*. I had considered the provisions of the act suspending the writ of *habeas corpus,* and issued many writs before the decision of brother *Battle* in *Long's case*. After reading his opinion, I still think it the duty of a judge to issue writs, and it is proper to give my reasons.

The first section of the act specifies *the cases* in which the writ is to be suspended; the third section provides *the mode* in which the suspension is to be effected. The question depends on its construction. "No military or other officer shall be compelled, in answer to any writ of *habeas corpus,* to appear in person, or to return the body of any person detained by him by the authority of the President and Secretary of War; but, upon the certificate under oath of the officer having charge of any one so detained, that such person is detained by him as a prisoner for any of the causes hereinbefore specified, under the authority aforesaid, further proceedings under the writ of *habeas corpus* shall immediately cease and remain suspended so long as this act shall continue in force."

(369) This section was evidently intended to apply to all cases arising under the act, and provides the mode for carrying it into effect. It was known to Congress that by the law of the State, judges are required under a penalty of $2,500 to issue the writs, and the object of this section is, while not interfering with that imperative duty, at the same time to give effect to the act, by suspending *further proceedings* on a certain state of facts. The writs are to issue as before, and *further proceedings* to cease on the certificate of the officer. No officer shall be *compelled* in answer to any writ of *habeas corpus* to appear in person, or to return the body. This assumes that writs will issue, but the officer shall not be compelled, by a *rule,* to make return according to the exigencies of the writ, but, in lieu thereof, is to file a certificate, under oath, and thereupon further proceedings shall cease. This takes it for granted that the proceeding is to go on until it arrives at that stage.

Note.—The cases in the appendix were reprinted from the newspaper reports of them.

The certificate is to be made *under oath,* as a protection to the citizen. There is no provision that in any of the cases specified it shall not be lawful to issue a writ. I am not aware of any principle of law by which a judge is at liberty to adopt a construction enlarging one section or restricting another, so as to deprive the citizen of a safeguard provided by an act which is to override all individual rights coming in conflict with it; although the judge may suppose this safeguard will, in the end, be of no avail, that question does not arise at the outset. Is this a *remedial* act to be construed liberally? My impression is it is an act in derogation of common right, and is to be construed strictly; at all events, the man, in my opinion, is entitled to the writ, and to proceed as he may be advised.

According to my views of the subject, the question of construction is not now presented, and I will not now enter into it. My brother *Battle* construes the words in the clause of the first section, "marked with a number 5," and "all attempts to avoid military service," so as to include the case of a person who, not being liable to conscription, (370) applies for a writ "for the sole purpose of establishing his claim to exemption," and arrives at the conclusion that as the *application* in such a case is one of the causes mentioned in the act, upon the man's own showing he is not entitled to the writ. Our statute required the writ to issue on *"probable cause."* The act of Congress does not expressly prohibit it, so if the facts alleged raise a question of law, unless it has been settled, and admits of no question, and is frivolous, the writ must issue. The party asks that "the matter may be inquired of," and, as it seems to me, the judge should grant the writ, unless he can say, "It is too plain to talk about." The proposition, that the mere application for a writ is one of the causes mentioned in the act, is startling! It might be said this extreme construction is not a necessary one, and the proper construction is to include only those persons who, whether liable or not liable, attempt to *avoid* military service by keeping out of the way, taking to the woods, instead of coming up and appealing to the courts to decide upon their rights, giving to the word "avoid" the sense it has in the English statutes of bankruptcy, where a debtor attempts to avoid his creditors by keeping out of the way, secreting himself, etc.; that if the mere application for a writ is an attempt to avoid military service in the meaning of the act, the certificate of the officer under oath is superfluous, for that fact is patent; whereas, if keeping out of the way is meant, the oath would have significance, and show the true cause of detention, and there is an incongruity in making the application a cause of detention, as it is a *consequence* and not the *cause;* that several well settled rules of law favor this construction—"where some particulars are enumerated, general words must be confined to acts

ejusdem generis." Here is a deserter harboring deserters—encouraging desertion. Keeping out of the way is an act somewhat of the
(371) same sort, but it is a strange association to class with crimes and misdemeanors the mere act of applying for a writ. Congress will not be presumed to intend an extreme exercise of power, or to exercise a doubtful power, unless the intention is expressed in plain and direct words. There is no precedent in this country or in England where the privilege of the writ has ever been suspended in *civil cases.* All the precedents are in cases of *political offenses,* treason, sedition, and the like.

I will not pursue the subject further, my purpose being merely to show that matter worthy of consideration may be urged against the construction of his Honor; so in my opinion I am not warranted in adopting the summary mode of refusing the writ, and am bound to pursue the mode provided by section 3.

There is another view. The certificate, besides the cause, must set out that the man is detained *as a prisoner* under the authority of the President or Secretary of War. How can a judge know this fact judicially unless it is certified? The petitions presented to me state that a substitute had been put in, and the party, being advised he is not liable to conscription, prays for the writ, that the matter may be inquired of. I cannot know, as a judge, that an order, either special or general, had been issued to detain the man as a prisoner for applying for the writ until the certificate of that fact is filed.

It may be the writ will be of no benefit to the petitioner. Whether the officer has it in his power, by the generality of the certificate, to exclude from the judiciary the question of construction, and whether it was the intention of Congress to enable him to do so, are questions not presented at this stage of the proceedings, and which can only arise on the filing of the certificate. I cannot refuse the writ.

Cited: In re Spivey, post, 541.

IN THE MATTER OF HUNTER.

A dentist is a physician, within the meaning of the act of Congress, and is exempt from conscription by reason thereof.

PEARSON, C. J. The petitioner is 37 years of age. In 1856 he graduated at "Philadelphia College" as a *surgeon dentist,* and has ever devoted himself exclusively to the practice of his profession, in which he is skillful, and in fact eminent.

The act of Congress exempts "all physicians who now are and for the last five years have been in the actual practice of their profession."

The question is, Does the word "physician" embrace a surgeon dentist?

In a restricted sense, "physician" means one who administers medicine to cure disease, but in its proper sense it has a broader signification, and means one who by a knowledge of the nature and structure of the human system, and of the nature and properties of substances, cures the injuries and diseases to which it is subject.

It is derived from a Greek word, *"phusis,"* nature—which is the root of many other words: "physic," medicine; "physic," to treat with medicine, to evacuate the bowels, to purge; "physic," the science of nature and of natural objects; "physical," pertaining to the material part or structure of an organized being, as "physical strength," "physical force," as distinguished from "moral force"; "physiology," the science of the functions of all the different parts and organs of animals and plants, the offices they perform in the economy of the individual, their properties, etc.

To say of a substance having the property to evacuate the bowels, it is a "physical herb," is not as appropriate as a "medical herb," because it uses the word "physical" in its narrow sense.

From its derivation, I am satisfied I have given the word phy- (373) sician its proper definition, and it includes not only "doctors" who administer medicine and physic, but "surgeons" who, by a knowledge of the nature and structure of the human system, are able to amputate an injured and diseased limb, or to extract a ball with skill and as much safety to life and as little pain as the case admits of. So the question is narrowed to this: Does a surgeon dentist come under this definition of the word "physician," or is he a mere mechanic, who cleans, plugs, and extracts teeth without the aid of science?

As the question was new and had not, so far as I could learn, been decided, I adjourned the case and required evidence to be taken as to the course of instruction at dental colleges, the knowledge it was neces-

sary to acquire in order to obtain a diploma and to practice with skill, and any other facts calculated to aid in the solution of the question, Is a dentist a machine merely, or a *surgeon,* devoting himself exclusively to one branch of the profession?

The depositions of many eminent gentlemen of the profession are filed; they all state that the course of instruction at the college includes anatomy, physiology, and *materia medica,* and a knowledge of all of these sciences is necessary to obtain a diploma and enable the party to practice with skill; and I concur in the opinion that a dentist is a "surgeon, devoting his practice to a specialty." With the aid of these depositions, and the argument filed by Mr. Fowle for the petitioner, I am satisfied that a regular graduated dentist is a "physician." I will add, that all who remember the time when "the doctor" carried in his saddle-bags that horrid instrument, a "pullican," and extracted teeth by main force, frequently bringing with it a part of the jaw-bone, will (374) readily admit that the division of labor has contributed greatly to the improvement of this branch of the science and the safety and ease of the patient; for now, instead of the "pullican" and brute force, there are various instruments fitted for each particular case. Teeth are often saved by removing the decayed part and filling and plugging; and new teeth are inserted, adding as well to the comfort as to the looks of the individual; and if a tooth has to be extracted, the "surgeon dentist" by his knowledge of "physiology" ascertains the condition of the system, and by his knowledge of "materia medica" administers the necessary alteratives to put it in proper condition; and by his knowledge of anatomy finds how the tooth is inserted in the jaw-bone, and knows what instrument will extract it with as little pain as possible, and without injury to the bone; and the depositions state that frequently surgeon dentists are called in to perform delicate operations on the "facial parts" (the upper and lower jaw-bone) which requires an intimate knowledge of the structure of the bones and the location of the arteries, veins, and nerves. In short, the teeth being more subject to decay and disease than any other part of the human body, I am satisfied, not only that regular educated surgeon dentists are physicians, but that the human family are much indebted to them for confining themselves to a "specialty," that is, one branch of the profession, whereby that which was some years ago a mere mechanical art has become a useful and important science.

It is therefore considered by me that John W. Hunter be forthwith discharged, with leave to go wheresoever he will.

The cost, to be taxed by the clerk of the Superior Court of Forsyth County, will be paid by J. H. Anderson. The clerk will file the papers in his office and give copies.

At Richmond Hill, 4 December, 1863.

(375)

IN THE MATTER OF WILLIAM WYRICK.

(1 Winst., 450.)

1. A conscript who has furnished a substitute under the act of Congress is exempt from military service.

2. He is entitled to be discharged under *habeas corpus*, although after furnishing a substitute he has been forced to serve sixteen months in army, and is absent from his command without leave when he sues out the writ.

PEARSON, C. J. The petitioner, before the passage of the conscription act, volunteered for the war in a company which Captain Shober was raising in Guilford, put in a substitute for the war, and was discharged; afterwards, notwithstanding his discharge, he was enrolled as a conscript and taken to the Army of Virginia, where he served sixteen months; last fall he came home on sick furlough, refused to return at the expiration of his time, was arrested, and sued out this writ. While in service, he had received pay, clothing, and rations, but had not received bounty.

The enrolling officer insisted that the petitioner being absent from the army without leave, could not be heard to claim a discharge until his offense was disposed of by a court-martial, and relied on *Graham's case,* 53 N. C., 416. In my opinion, that case does not apply. Graham entered the army by enlistment before he was 21 years of age, and being under arrest for some collateral offense, sued out a writ, seeking to avoid his contract of enlistment on the ground of infancy. It was held that he could not be heard until the offense for which he was under arrest was disposed of by court-martial. Graham went into service voluntarily, and was rightfully a soldier until the contract was avoided; his offense was a collateral act, having no connection with the validity of his enlistment. The petitioner was taken to the army against his consent; the matter, as he alleges, was void *"ab initio";* the supposed (376) offense grows out of and depends on the question whether he was rightfully a soldier or not; and that is the point put at issue by this proceeding. It would be strange if the Court, before it can try the question, is required to assume, in favor of the Government, that the petitioner is rightfully a soldier, and on that ground to remand him to be tried before a court-martial for an act the character of which depends on that very question! "No one shall take advantage of his own wrong" is a maxim of law. Suppose the petitioner was not liable to conscription, the act of the Government was wrongful, and his act in leaving the army in order to assert his right before a judicial tribunal of his

country is justifiable, because made necessary by the first wrongful act of the Government. To refuse to hear him would be to enable the Government to take advantage of its own wrong, and amount to a denial of justice. See how it would work: a man leaves the army, comes home and appeals to a court to try the question whether he is rightfully a soldier or not; the court refuses to hear him; he is sent back to the army in Virginia, tried by a court-martial as a deserter, and executed to deter others from like acts; that is the end of it. Or suppose he is punished, and allowed to live: he is without remedy in the courts of his country, because beyond the reach of their process. Will it be said this denial of justice is necessary for the good of the public service to prevent desertion? God forbid! *"Fiat justitia, ruat cœlum,"* let justice be done without regard to consequences! The case of *Dixon* is direct authority for the petitioner on this preliminary question. (See reference *In re Guyer, ante,* 66.) *Dixon* was under 35 years of age, a blacksmith, taken as a conscript and serving in the army when the exemption act passed; served several months, received bounty, pay, clothes, and (377) rations; came home on furlough, refused to return, and was arrested as a deserter, and sued out the writ on the ground that he was not rightfully a soldier. On the preliminary question the two learned gentlemen who appeared for the Government did not rely on the case of *Graham* as applicable; and the Court considered that he was not precluded from being heard on the merits by the fact that he was absent without leave, but went into the merits, and decided against him. I have a distinct recollection, although I do not remember the names of the cases, that in looking over "Hurd on Habeas Corpus," in reference to this preliminary question, he cites several cases in which *an alleged deserter* was heard on the merits, taking the distinction between the cases where the enlistment is alleged to be void, as in this case, and where it is alleged to be voidable, as in the case of *Graham.* So, both upon "the reason of the thing" and upon authority, I decide the preliminary question in favor of the petitioner.

On the merits, according to the decision of the Supreme Court in *Ritter's case, ante,* 76, the petitioner was not liable to conscription, and I learn the enrolling officer refused to exempt him, because he had special instructions not to regard the decisions of the Supreme Court unless the party had been discharged on writ of *habeas corpus. On the question of waiver:* do the facts, that he receives pay, clothing, rations, and serves sixteen months, make him liable to serve for the war? He insists that the Government would thereby take advantage of its own wrong. The enrolling officer insists that these facts amount in law to a waiver of his original right growing out of the substitution, and relies on *Dixon's case.* In that case the point is not positively decided, there

being another ground, to wit, that as he was in service, the exemption act does not embrace his case. But I know the judges were of opinion that when all of these facts exist, to wit, receipt of bounty, pay, clothing, rations, and service, there is a waiver of a right to exemption, and I have accordingly, on that ground, remanded the parties in three other cases.

But *In re Fleming,* who was arrested as a conscript and, with- (378) out an opportunity to sue out a writ, taken to Camp Holmes, sent to Richmond, and then to Staunton, where he left the army without leave, came home and was arrested as a deserter, I had General Hoke notified, and it being objected that, as he was a deserter, he could not be heard until a court-martial had disposed of him, I overruled the objection for the reason above stated, and on the authority of *In re Dixon.* On the merits, it appeared that he was over 35, and the keeper of a public mill, and had been refused exemption on the ground that he attended to a sawmill as well as a gristmill! I held that position untenable. On the question of waiver, it appeared that he had been under military restraint for three weeks, had received rations, and drilled a time or two. I held there was no evidence of a waiver—he was obliged to eat and forced to drill, and it was bad enough that he had been put in jail, taken off, tied like a felon, and restrained of his liberty for three weeks against law. In the matter of..... (I forget the name) the petitioner was a blacksmith, had been detailed, was afterwards taken as a conscript to Virginia, kept there three months, most of the time in the hospital, sent home on a sick furlough, and refused to return. I overruled the preliminary objection. On the merits, I held he was exempted according to *Guyer's case,* and as to waiver, that the additional circumstance of receiving clothes did not vary the case from that of *Fleming;* clothes were necessary and he was required to be in uniform.

In this case, there are the additional facts of receiving pay and serving sixteen months. *As to pay,* two considerations bear on the matter: a soldier is, in many cases, obliged to draw for his own comfort and the support of his wife and children in his absence. The (379) pay is only an equivalent for services rendered, and, consequently, cannot be the foundation for an implication of a waiver or consent to serve for the war; as to the *sixteen months service,* it would seem the Government should be content with having exacted that much out of him, and can on no principle make it the ground for forcing him to serve during the war. The case differs from that of *In re Dixon* in this: no *bounty was received,* which is the most material and unequivocal evidence of a waiver; it is a voluntary act, inconsistent and against conscience, except on the supposition that the party is to serve out the whole time as a conscript; and for that reason the Court in *Dixon's case*

considered this fact, connected with and propped by the other facts, evidence of a waiver or consent to serve for the war. The acceptance of bounty is so important a fact that a case cannot be made out without it; it would be like an arch without a keystone, or acting the play of Hamlet with the character of Hamlet omitted.

It is, therefore, considered that the petitioner be discharged.

December, 1863.

NOTE.—*Vide Gatlin v. Walton, ante,* 333.

IN THE MATTER OF BRADSHAW.

(1 Winst., 454.)

A. was elected and qualified as constable in March, 1863. In April, 1863, he was conscripted, and on 5 May, 1863, was sent to the ramy, where he served six weeks, receiving bounty. *Held*, that he was exempted, as a State officer, under act of Congress of 1 May, 1863, enacted while he was in the service.

(380) PEARSON, C. J. In March, 1863, the petitioner, being elected a constable, was duly qualified and entered upon the discharge of the duties of his office. In April, 1863, he was sent to the camp of instruction as a conscript; on 5 May, 1863, he was sent to the army, where he served about six weeks. On joining the army, he received bounty, but has never received any pay; he came home on furlough until his case could be decided. A correspondence was had between Governor Vance and the Confederate authorities, which need not be set forth. On 15 January, 1864, he sued out a writ of *habeas corpus.*

Congress, 1 May, 1863, enacted: "In addition to the State officers exempted by the act of 1 October, 1862, there shall be exempted *all State officers* whom the Governor of any State may claim to have exempted for the due administration of the Government and the laws thereof," etc.

Governor Vance, on 9 May, 1863, claimed to have exempted "all justices of the peace," etc., "constables who entered into bond previous to 11 May, 1863, and their successors in office," etc.

The Legislature, on 14 December, 1863, adopted and made permanent the claim which had been made by Governor Vance.

1. The receipt of bounty by the petitioner was a waiver to any claim to exemption under the act of 11 October, 1862; but, of course, it could not have the legal effect of being a waiver of any exemption to which

he might afterwards become entitled. Its effect is to put him in the condition of a soldier having at that time no right to exemption.

2. The next question is, Did his being placed in the military service as a conscript vacate his office of constable? or did he continue to hold that office while he was in the condition of a soldier? Absence from the country or *nonuser* does not *per se* deprive one of a public office; it may be cause of forfeiture, but the office continues until there be proper legal proceedings to put him out of it. This is well settled; 2 Bl. Com., 153.

3. The question, then, is narrowed to this: Does the act of (381) Congress, and the claim that Governor Vance made in pursuance thereof, and the act of the Legislature, embrace the case of a constable who was, at the date of the claim of the Governor, in the military service of the Confederate States; or is the exemption confined to constables who were not in the military service? The words of the act of Congress are general: "There shall be exempted *all State officers* whom the Governor of any State may claim," etc. The words of the Governor's claim and of the act of the Legislature are also general: "All justices of the peace, etc., constables who have given bonds previous to 11 May, 1863," etc.

I can see no ground to except from the operation of these general words State officers who were in the military service. If such was the intention, a proviso to that effect would have been made; and there is no rule of law under which it can be made by construction. I am therefore of the opinion that the petitioner is exempted.

It was suggested in the argument that the exception should be made by implication from the use of the words "shall be exempted," and it is said that the word "exempted" is restricted in its meaning to persons who are not in the military service, and "discharged" is the proper word when referring to persons who are in the military service. This distinction may obtain in military circles, but the word "to exempt" is not a technical term; it is a plain English word, and means literally "to take out of or from," and its ordinary signification is "to free from, not be subject to," any service or burthen to which others are made liable; as, to exempt from military service, to exempt from taxation; and it is a settled rule of construction, words in a statute are to be construed according to their ordinary meaning, unless there is something to show they are used in a different sense. The courts can- (382) not expect Congress to take notice of the military parlance, and require, in order to express the intention, that all the State officers whom the Governor may claim as necessary, etc., shall be free from military service, that this particular mode of expression shall be adopted, to wit: "All State officers not in the military service shall be *exempted,* and all who are in the military service shall be *discharged,* whom the Governor

may claim as necessary," etc. The meaning as expressed by the act of Congress to exempt all State officers is clear; and the words used to express the intention are appropriate according to their well-known signification.

It was further suggested that from the nature of the subject the act should be so construed as not to embrace State officers who are in the military service; and it is assumed that Congress did not intend to take any one out of the army. There is the same reason to assume that Congress did not intend to keep any one out of the army! It may be said, on the other side, the power of Congress to conscript was seriously questioned, and especially its power to conscript State officers, who were necessary for the due administration of the Government and the laws thereof, and this extended exemption was a concession designed to avoid all conflict with the States, and the use of the peculiar words, "whom the Governor of any State *may claim* to have exempted," countenances this idea. But these are conjectures on political questions into which the courts are not at liberty to enter.

The cases of *Irvin, Meroney,* and of *Bryan, ante,* 1, in which it is held that the conscription acts do not embrace persons already in service, and of *Guyer, ante,* 66, and others, in which it is said that the exemption act of 11 October, 1862, did not embrace mechanics between 18 and 35,
(383) who were already in service, may seem at first blush to oppose the conclusion to which I have arrived; but upon examination, these cases will be found negatively to support it. The general words of the conscription acts embrace all white males between 18 and 35 and between 35 and 45, and it is only by reference to the nature of the subject and the context, that persons already in service were excluded. *The nature of the subject,* for there was no occasion to conscript persons in service for three years or the war; they were soldiers already. The *context,* for the provision as to camps of instruction, calling the men into service at different times, etc., were not applicable to persons already in service.

So the general words of the exemption act of 11 October, 1862, embraced all shoemakers, blacksmiths, etc., and it is only from the context that shoemakers, blacksmiths, etc., already in service were excluded. These were required to be *"actually employed* in their respective trades *at the time,"* which, in reference to those between 18 and 35, was held to be at the passage of the act, in order to fit it to the conscription act of April, 1862; and in reference to those between 35 and 45, or who afterwards come to the age of 18, "at the time" is taken to mean when called into service; and this actual employment in their respective trades could have no application to men who were in the military service, and so could not be actually employed at their trades.

But in our case we have seen there is nothing in the subject-matter which the courts can judicially take notice of, and there is nothing in the context to control the general words, so as to exclude State officers who may be in the military service, supposing the position to be correct, of which there can be no doubt, that being in the military service does not *per se* deprive one of his office.

My conclusion is also supported by the decision of *Judge Haliburton,* of the District Court of the Confederate States, *In re Lane,* where it is held that a soldier who becomes a mail contractor is embraced (384) by the act of Congress of 17 April, 1863, and is exempted from military service; and by the decision of *Judge Meredith, In re Brooking* (which I noticed briefly referred to in a newspaper), where it is held that a soldier who, while in the service, was elected a justice of the peace and regularly qualified as such, was exempted.

It is thereupon considered by me that Joseph Bradshaw be forthwith discharged, with leave to go wherever he will; the costs, to be taxed by the clerk of the Superior Court of Alamance County, will be paid by W. A. Albright. The clerk will file the papers and give copies.

At Richmond Hill, 3 February, 1864.

Cited: In re Sowers, post, 386.

IN THE MATTER OF JESSE SOWERS.

(1 Winst., 459.)

A soldier in the army, who becomes a mail contractor, is as such exempted from further military service, and should be discharged under *habeas corpus.*

PEARSON, C. J. The petitioner, Jesse Sowers, filed his bid for carrying the Confederate States mail on Route No. 2222, between Thomasville and Shady Grove in the State of North Carolina—14 miles long, stating, in his application that he was then a soldier in the Confederate Army; which bid, with this assurance, was accepted by the Postoffice Department, and he was discharged by the officers of his regiment and brigade. His bonds were accepted and he put in charge of the mail, which he has been carrying from July up to the time of his arrest.

The act of 14 April, 1863, enacts: "That the contractors for (385) carrying the mails of the Confederate States shall be exempt from performance of military duty in the armies of the Confederate States from and after the passage of this act, during the time they are such

contractors: *Provided,* that no more than one contractor shall be exempt on any route, and that no more than one member of any firm of contractors shall be exempt, and no contractor on any route of less than 10 miles in length, and on which the mail is carried on horse, shall be exempt under this act; and if one or more members of any firm be exempt, from age or other cause, from the performance of military duty, the other member or members of such firm shall not be exempt by this act on account of being mail contractors: and *Provided further,* that no person to whom a contract for carrying the mails may be transferred, with the consent of the Postoffice Department, after the passage of this act, shall be exempt from military service on that account."

The question is, Does this act embrace persons who are in the military service of the Confederate States, so that a soldier is at liberty to become a bidder for a mail contract, and, if he obtains it, gives bond, and enters upon the performance of the contract, he is exempted from military service; or is the operation of the act confined to persons who are not in the military service? Upon this question there seems to be a conflict between the Department of War and the Postoffice. The one insists that the act extends to all persons who may choose to bid—the policy being to have as much competition as possible, and in that way get the mail service performed for the lowest amounts. The other, that the act does not include persons who are enrolled as conscripts, and certainly not those in actual military service. The courts are not at liberty to enter into a discussion of this political question. Our duty is to ascertain, by fixed rules of law, the intention of the lawmakers from the words they have selected to express it.

(386) In this case the words are general. What is then to control them and except from their meaning persons who have been enrolled or are actually in military service? There is no proviso to that effect. It is said this should be supplied from the use of the word "exempted," which we are told in military circles is confined to persons not in service, the word "discharge" being used in reference to those who are in the service. "Exempted" is not a technical term, and, as is said by *Judge Haliburton,* of the District Court of the Confederate States, *In re Lane,* and by myself *In re Bradshaw, ante,* 379, in its ordinary signification, its meaning is "to take out of or from," "to free from" any service or burden to which others are subject—as to exempt from military service; to exempt from taxation. It is a settled rule of construction that words in a statute are to be taken in their ordinary signification, unless there be something in the subject-matter or in the context to show they were used in a different sense. The courts cannot require members of Congress to take notice of a distinction which may obtain in the War Department or among gentlemen of the army, and to

conform to it, by saying all persons not in the army or enrolled as conscripts, becoming mail contractors, shall be "exempted," and those who are in the army or have been enrolled as conscripts shall be "discharged," in order to express the intention to free from military service all mail contractors. It is sufficient if words be used which, in their ordinary signification, express that intention; if so, the courts must give effect to it. There is nothing in the nature of the subject of which the courts can take notice, and nothing in the context to control the (387) general words.

The cases of *Irvin, Meroney,* and of *Bryan, ante,* 1, as to the construction of the conscription act; *In re Guyer, ante,* 66, and others, as to the construction of the exemption act, 11 October, 1862, support this conclusion—for in those cases special considerations, growing out of the nature of the subject and the contexts are relied on and held sufficient to control the general words. Here there are no special circumstances, and the general words stand by themselves and must be allowed their full effect. The decision of *Judge Haliburton In re Lane,* referred to above, is an authority directly in point—the very question is decided—save that this case goes a little further, because the petitioner proves the additional fact, that after being accepted as a mail contractor, he was discharged from the army by the proper military authority; but I lay no stress on this circumstance, and base my decision on the general principles. The decision of *Judge Meredith, In re Brooking,* that a soldier in the army who is made a justice of the peace and duly qualified as such is exempted, also supports my conclusion, and likewise my decision *In re Bradshaw,* in which it is held that a constable, although in the army, is exempted by the act of May, 1862, and the claim of the Governor in pursuance thereof, to have exempted "all constables," as necessary for the due administration of the laws of the State, and the reasoning on which it is put, support the conclusion that the petitioner is exempted by law.

It is, therefore, considered by me that the petitioner, Jesse Sowers, is entitled to exemption from service in the Confederat Army, and it is adjudgd by me that he be discharged, with leave to go whereso-ever he will. It is ordered that Lieut. J. A. Little pay the cost, (388) to be taxed by the clerk of Davidson Superior Court; that the papers be filed in the office of the said clerk, and that the clerk give copies to the parties.

Done at Salisbury, N. C., 20 February, 1864.

NOTE.—*Vide In re Russell, ante,* 388; *Smith v. Prior, post,* 317; *Johnson v. Mallett, post,* 410; *Bridgman v. Mallett, post,* 500; *Johnson v. Mallett, post,* 511; *Bringle v. Bradshaw, post,* 514.

IN THE MATTER OF D. L. RUSSELL.

(1 Winst. 463.)

1. An officer in the army who has been reduced to ranks, and thereupon appointed county commissioner, is exempt from military service, and must be discharged from custody as a conscript.
2. The validity of his appointment, on the ground of infancy, can only be impeached by a *quo warranto* or other proceeding in which the matter can be put directly at issue and the office adjudged forfeited or vacated. It cannot be impeached collaterally. (*In re Cain, post,* 525, cited and approved.)

PEARSON, C. J. In 1864, Daniel L. Russell, Jr.,* was commissioned a captain in Company G, Thirty-sixth Regiment, North Carolina Troops. In February, 1864, he was sentenced by a general court-martial "to be dismissed from the service," which sentence was approved by General Whiting, "so as to deprive him of his commission," and the general granted him the privilege of selecting another company, if he desired to do so, and gave him leave of absence for thirty days. In March, 1864, Russell was appointed county commissioner by the justices of Brunswick County, gave bond and entered upon the duties of the office on 11 March; the Governor certified that he was a county officer, necessary for the proper administration of the government of the State. Notwithstanding his appointment, and the Governor's certificate, General Whiting claimed him as a private, liable to military service; whereupon he sued out a writ of *habeas corpus,* asserting his right to exemption.

(389) The act of Congress, 17 February, 1864, is a general conscription law. By the first section, all white men, residents of the Confederate States, between the ages of 17 and 50, are conscripted for the war. Section 2 has reference to men between the ages of 18 and 45 "now in service," and the sole purpose is obviously to make a distinction between them and other conscripts, *by retaining them in the same regiments, battalions, and companies to which they belonged at the passage of the act,* instead of having them enrolled and sent to camp of instruction. There is nothing in the act to show an intention to put them on a different footing from other conscripts in any other respect, or to exclude them from the operations of the provisions in relation to exemptions. It follows that the first ground taken in the return, to wit, that Russell, being already in service, cannot be a conscript, and, consequently, is not embraced by the provisions in relation to exemptions, is untenable. So the question is, Does clause 2 of section 10 exempt one who is in service at the time he is elected or appointed a State officer—

*Governor of North Carolina, 1897-1901.

a member of the Legislature, for instance, or a State officer, whom the Government may certify is necessary for the proper administration of the State Government, *i. e.*, a judge of the Supreme or Superior Court (for as the act is worded, these officers, although constituting a coördinate branch of the State Government, are required to entitle themselves to exemption by the certificate of the Governor), or a justice of the peace, constable, or county commissioner?

The question is stated broadly, in order not to raise the issue made by the petitioner and return, as to whether Russell, at the time of his appointment, was in actual military service, or only constructively so; for, assuming that the effect of the sentence of the court-martial was not to dismiss him from the service, and subject him to conscription, *de novo,* but simply to deprive him of his commission and make him a private in the company of which he had been captain, I (390) am of opinion that his appointment to the office had the effect of exempting him from military service, both by force of the Constitution and of the act of Congress and the certificate of the Governor in pursuance thereto.

The authority of the Government to conscript is derived from the power conferred on Congress to "raise and support armies." This power, from the very nature of things, is subject to the restriction that it shall not extend to the Governor, members of the Legislature, judges or other officers necessary for the proper administration of the State Government; for as the Confederate Government is a creature of the States, it is absurd to suppose that the intention was to make a grant of power which would enable the creature to destroy its creator, and cause the existence of the States to be dependent on the pleasure of Congress.

Apart from this, the act of Congress in general terms exempts "members of Congress, and of the several State Legislatures, and such other Confederate officers as the President or the Governors of the respective States may certify to be necessary for the proper administration of the Confederate and State governments, as the case may be."

The province of deciding what officers are necessary for the proper administration of the State governments belongs to the Legislature. That body has deemed it necessary to provide for the appointment and exemption of county commissioners (act of 1864), and in compliance therewith the Governor has certified, in pursuance of the act of Congress, that this officer was necessary.

Will it be said the States must procure their Governors, members of the Legislature, judges, and other necessary officers from among the citizens who are over the age of conscription, or at all events those who are not already in service, and cannot take a man out of the army to

(391) fill any of these offices? On what ground is this assumption based? There is no such provision in the Constitution, or in the act of Congress, or in the act of the Legislature, and there is nothing from which it can be implied; on the contrary, the implication is directly against it, and the courts cannot presume that it was the intention thus *to narrow the field of selection in regard to State officers.* Nothing short of plain and direct words could be allowed to have that effect. The practice in such cases, and the legislation of Congress whereby it is provided that a military officer may resign when elected or appointed to a civil office in a State, confirm this conclusion, and leave no room to question the position that a private, although in the ranks, whenever he is elected or appointed and is qualified and inducted into an office under the State, and the Governor certifies, in pursuance to the act of Congress, becomes by the force and effect thereof exempted.

The second ground taken in the return is also untenable. The court or judge, in a proceeding of this nature, is not at liberty to go behind the record of the qualification and appointment of a party. The validity of his appointment, on the ground that Russell is under the age of 21 years, cannot be impeached in this collateral way. It can only be done by a *quo warranto,* or other proceeding, in which the matter can be put directly at issue and the office be adjudged forfeited or vacated.

The writ of *habeas corpus* is used in cases like the present as a civil remedy for the purpose of having the liability of the petitioner to conscription adjudicated, for the reasons given by me in *Cain's case* (*post,* 525). I am of opinion that the act of Congress suspending the writ of *habeas corpus* does not apply to this case. Since the decision in *Cain's case* I was gratified to find that my conclusion is supported by the opinion of *Chief Justice Marshall* in *Bollman v. Swartwout,* 4 Cranch, 75. He says that the clause of the Constitution which authorizes the suspension of the writ applies only to the writ of *habeas corpus ad sub-*
(392) *jiciendum,* "the great writ of right," sued out by a person who stands committed for some criminal or supposed criminal offense, and does not embrace the inferior kinds of the writ, such as *habeas corpus ad testificandum* and the like. I will also refer to the very full and able argument filed by Mr. Moore in this case.

I am of opinion that the return of W. H. C. Whiting is insufficient, and does not show that the petitioner is liable to military service. My conclusion is that he is entitled to exemption, and should be discharged, the facts set out in the return to the contrary notwithstanding.

Richmond Hill, 25 July, 1864.

NOTE.—*Overruled* by *Smith v. Prior, post,* 417; *Vide In re Sowers, ante,* 384; *Johnson V. Mallett, post,* 410. See note to *In re Sowers, ante,* 388.

IN THE MATTER OF WILLIAM H. CUNNINGGIM.

(1 Winst., 467.)

One who is a local preacher of the Methodist Episcopal Church, South, regularly officiating as such, without salary, but who supports himself by keeping a hotel, is exempt from conscription under act of Congress of 17 February, 1867, as a "minister of religion."

P. H. Winston and R. G. Lewis, counsel for petitioner.

BATTLE, J. This is a proceeding under a writ of *habeas corpus,* in which the petition, return, and proof present the following case:

The petitioner is, and has been for five or six years, a local preacher of the Methodist Episcopal Church, South, duly licensed as such according to the rules of his church. It is a part of the discipline of this church that the license of a local preacher must be given by (393) the Quarterly Conference and signed by the president of the Conference, and must be renewed every ecclesiastical year. A local preacher is a minister of his church, and his duty is to preach and perform such other duties as may be assigned by his presiding elder or preacher in charge; but, until he is ordained as a deacon, he cannot administer the sacraments of his church. He is not entitled to any salary or pay for preaching or for the performance of his other ministerial duties. The petitioner was, prior to 17 February last, and has been ever since that time, located at the city of Raleigh, and has been constantly and regularly engaged in preaching every Sunday, alternately, to two congregations in the country, near the city, and at the hospitals, and also performing other ministerial duties, by attending class meetings, etc., all under the superintendence of Dr. Craven, his preacher in charge. He has received no salary or pay from his church or his congregations, but has supported himself from the income of a hotel in the city of Raleigh, of which he is the owner and manager.

Having been enrolled as a conscript and carried to Camp Holmes, the petitioner claims to be discharged under an act of the Confederate Congress, ratified on 17 February, 1864, which grants an exemption from military service in the army of the Confederate States to "every minister of religion authorized to preach according to the rules of his church, and who, at the passage of this act, shall be regularly employed in the discharge of his ministerial duties." The commandant of conscripts for this State denies his right, and insists upon retaining him in custody as a conscript under a regulation adopted by the Bureau of Conscription, to the following effect: "If the party is a regularly licensed minister, authorized to preach according to the rules of his sect, and that is his only business, he is entitled to exemption. If, however, he

depends for support on any other business, even if he should preach regularly, he is not entitled to exemption."

(394) That the case of the petitioner is obviously within the letter of the act of Congress cannot be denied. He is, according to the policy of his church, a minister of religion, duly authorized to preach, and he was, at the time of the passage of the act of Congress, regularly employed in the discharge of his ministerial duties. He is, therefore, entitled to be exempted from the performance of military service, unless the Bureau of Conscription is authorized, by law, to make a regulation other than that prescribed in the act of Congress, by which he shall be held as a conscript, or in construing the words of the act the Bureau has adopted a construction which is in accordance with its spirit, though not within its strict letter. I cannot find in the act any authority conferred upon the Bureau of Conscription to frame regulations upon this subject; and I cannot suppose that it sets up a claim to an independent power of legislation. In making provision for carrying the act into effect, the Bureau must ascertain its meaning, and, in doing so, must necessarily put a construction upon its language. That construction, though, is not conclusively binding upon the persons upon whom the act is to operate, for they have an undoubted right to appeal to the courts of law for redress, and it is the decisions of such courts alone which can finally settle the disputed point. The true and only inquiry before me, then, is whether the Bureau of Conscription has adopted the proper construction of the act in question, according to the intention of those who framed it—that is, according to the reason and spirit of it.

I have already remarked that the case of the petitioner is obviously within the letter of the act of Congress. This being so, it is incumbent upon the Government to show that it is not also within its reason and spirit, for it is the first among the fundamental rules for the inter-

(395) pretation of laws to construe words in their usual and most known signification. If the words be dubious, then we may resort to other means for ascertaining the will of the Legislature, among which is that of considering the reason and spirit of the law, or the cause which moved the Legislature to enact it. See 1 Bl. Com., 59 and 61. Supposing, then, that there is some dubiousness in the meaning of the act under consideration, let us inquire what was the motive which induced members of Congress to pass it. About that there cannot be the slightest doubt. Most manifestly it was to afford to all who should not be called into the field—to the men, women, and children who should remain at home—the services of all the ministers of religion, of every grade in every denomination, who were duly authorized to preach, and who, when the act was passed, were regularly employed in the discharge of their ministerial duties. Can any good reason be given why these minis-

trations may not be useful and productive of much good, though rendered by unpaid ministers? In the ecclesiastical polity of the M. E. Church, South, the local preachers form, as I learn, the most numerous class of their ministers. They occupy an important though it may be an humble field of labor, and are deemed essential in the scheme of that church, as furnishing the means whereby "the poor have the gospel preached to them." The fact that they take nothing from the coffers of their church for their support renders that body much more able to sustain those who are laboring in the higher grades of the ministry. These unpaid ministers are thus enabled to effect much good, both by what they do and by what they abstain from doing. In working for nothing of an earthly nature and supporting themselves, they have, as was well said by Messrs. Winston and Lewis, the counsel for the petitioner, an illustrious example in St. Paul, the greatest preacher whom the world has ever known, who worked with his own hands at his occupation of a tent-maker, that his support might not be a burden to the (396) churches of Corinth and Ephesus. See Paley's *Horæ Paulinæ,* ch. 3, No. 6. Has this great apostle ever been considered as having forfeited any of the rights as a preacher by reason of such forbearance and self-denial? On the contrary, has he not furnished to all succeeding ages an additional proof of the divinity of his mission and of the sincerity of his devotion to it, by showing that amidst the severest of trials, persecutions, and afflictions he labored not for the riches and honors of this world, but for the temporal and eternal good of his fellow-men, and for that crown of glory which his faith assured him was laid up for him in heaven? From these considerations I am led to believe the ground upon which the Bureau of Conscription would exclude from the exemption contained in the act of 17 February, 1864, that class of preachers to which the petitioner belongs, was not within the contemplation of Congress, and ought not, therefore, to control the decision of the question now before me.

But there is, no doubt, another class of ministers of religion, having authority from their respective sects to preach, to whom it might, perhaps, be properly applied. I allude to those ministers of different denominations who, being in affluent circumstances, preach occasionally and from time to time as their ministerial services may be required, without receiving any compensation therefor. In analogy to *In re Grantham, ante,* 73, in which it was decided that under the act of 11 October, 1862, a mechanic was not entitled to exemption from military service unless he followed a trade as his regular occupation and employment, it may be that such ministers of religion should not be exempted under the act of February, 1864. Cases of this latter kind were probably in the minds of the Bureau of Conscription when they adopted the

regulation to which I have referred. But it is manifest that this class of cases differs essentially from that in which the petitioner is embraced.

We have in this State an act which requires that the rites of
(397) matrimony shall be performed by justices of the peace or by "ordained ministers of the gospel of every denomination." See Rev. Code (1856), ch. 68, secs. 1, 2. I feel quite sure that there is not a judge in the land who would for a moment feel himself at liberty to decide that a marriage was void because the ceremony had been celebrated by an ordained minister, who depended for support upon some other business than that of his ministry.

The conclusion to which I have come in favor of the petitioner derives additional support from the fact that under the act of October, 1862, which is almost in the precise terms of the last act, no person holding the same position in his church as that occupied by the petitioner has, so far as I have heard, ever been enrolled and called into the military service as a conscript.

My order is that the petitioner be discharged, and that his costs be paid by the defendant.

Chapel Hill, 8 August, 1864.